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No.

Office-Supreme Court, U.S.

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ALEXANDER L. STEVAS,

IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

WESTINGHOUSE ELECTRIC CORPORATION, *et al.*,
Petitioners,

versus

S/S LESLIE LYKES, her engines, etc., in *rem*, and
LYKES BROS. STEAMSHIP CO., INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

PETITION OF WESTINGHOUSE ELECTRIC CORPORATION, *et al.* FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT

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Questions Presented

1. In a suit to recover cargo loss or damage, can there be design or neglect causing the carrier's defense under the Fire Statute (46 U.S.C.A. §182) to fail, where there is no proof that the carrier's management knew, but the District Court found that the carrier's management should have known, that the cargo would be improperly stowed as the stowage plan was made in the carrier's Home Office and the stowage was in conformity with longstanding practice of the carrier?

2. Can there be design or neglect causing the carrier's defense under the Fire Statute (46 U.S.C.A. §182) to fail, where the vessel is in a foreign port, but the master, under the supervision of and with the approval of corporate officers in the Home Office and a Home Office supervisory port engineer present aboard the vessel, employs negligent procedures in the effort to extinguish a fire?

3. If fire results from unseaworthiness existing at the start of the voyage, does the burden of proof in regard to exercise of due diligence, placed by COGSA (46 U.S.C.A. §1304(1)) on the carrier, fall instead on cargo?

4. What is the proper standard to be applied under the Fire Statute (46 U.S.C.A. §182) as to proof of cause of a fire?

**Parties to the Proceedings and Their Parent
Corporations, Subsidiaries and Affiliates, if Any**

Westinghouse Electric Corporation (Subsidiaries and Affiliates: Tyree Industries Limited (Australia), Westinghouse Canada, Inc. (Canada)), Witco Chemical Corporation (Subsidiaries and Affiliates: Baxenden Chemical Co., Ltd., Witco Chemical Ltd., Surpass Chemicals, Ltd., Petroquímica Argentina S.A., Industrias Químicas ACSA Ltda.), Italsempione, S.p.A., Manifattura Rotondi, Astron Forwarding Company, Lubrizol International, S.A., Comercial Algodonera Juan Mata, S.A., Morrison Knudsen International Company, Inc., L'Enterprise Nationale Pour La Recherche, La Production, Le Transport, La Transformation Et La Commercialisation Des Hydrocarbures.

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PETITION OF WESTINGHOUSE ELECTRIC CORPORATION, et al. FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on June 14, 1984.

Opinions Below

The opinion of the Court of Appeals for the Fifth Circuit entered on June 14, 1984 is reported at 734 F. 2d 199 (5th Cir. 1984). That Court's unreported per curiam order denying petitions for rehearing and rehearing en banc was filed on July 13, 1984. The opinion of the District Court dated February 10, 1982 was not officially reported but appears at 1982 A.M.C. 1477 (E.D. La. 1982). The opinions of the Circuit and District Courts are reprinted herein as Appendix A and Appendix D, respectively.

Jurisdiction

The opinion of the Court of Appeals for the Fifth Circuit was entered on June 14, 1984 and was issued as a mandate on July 23, 1984. Timely petitions for rehearing and rehearing en banc were filed. These were denied by order dated July 11, 1984 and entered on July 13, 1984. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Statutory Provisions Involved

Fire Statute (46 U.S.C.A. §182) which provides:

No owner of any vessel shall be liable to answer for or make good to any person any loss or damage, which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner.

COGSA (46 U.S.C.A. §1303(1), (2) and §1304(1), (2) (b)) which is quoted in Appendix F (pp 64a-65a).

Statement of the Case

Fire broke out in a cargo compartment aboard the M.V. LESLIE LYKES on September 1, 1976, two days after she had sailed on a voyage from U.S. ports bound for European ports (4a, 45a-46a).

The fire was preceded for 8 hours by a clanking noise (4a, 45a) believed by the master to be caused by movement in that compartment of drill pipe held together by chains secured by turnbuckles (Tr. 93—first day; Tr. 61, 62—fourth day). The turnbuckles could be adjusted to tighten the chains to prevent movement of the cargo and were provided for that purpose (45a). It is usual for the crew to inspect and tighten turnbuckles during a voyage (45a). This could not be done here as access had been blocked by cargo stowed over the manholes in the compartment above (4a, 44a-45a).

As was always the case, the stowage had been planned in the Home Office of the carrier at New Orleans, and the blocking of the access was in accordance with the carrier's usual practice (20a, 54a-55a). The District Court found that the carrier's management should have known that the access manholes would be covered by cargo on the voyage of the fire (54a). The Fifth Circuit reversed holding that cargo must, but failed to show that management had actual knowledge that the access would be blocked (24a-27a). This holding appears inconsistent with rulings of the Second Circuit giving rise to the first question presented.

The fire was quickly reduced to, and, during the remainder of the voyage was kept in a quiescent state by use of CO₂ and steam (5a-6a, 40a-47a). In daily radio conversations, the master kept the carrier's New Orleans management informed as to the state of the fire. They in turn provided advice, which he followed, and approved of the tactics being applied (5a-6a, 47a).

The fire was to all intents and purposes out when the vessel arrived at El Ferrol, Spain, her first scheduled port of call (6a, 47a). The master thereafter consulted with local fire authorities and with the carrier's supervisory port engineer who had been sent from the Home Office to the vessel at El Ferrol because of his experience in fire fighting (6a, 47a-48a). The circumstances of the fire and plan for extinguishing it were also discussed daily by the master and the carrier's corporate officers at New Orleans by telephone. They and the supervisory port engineer approved the plan and the latter actively took part in its execution (6a-8a, 56a-57a).

Cargo contended at the trial and presented evidence that the plan was deficient in that several valuable Westinghouse rotors, stowed at the top of the compartment adjacent to the one on fire as El Ferrol was their destination, should have been discharged, as advised in fire fighting manuals, before the hatch on fire was opened to fight the fire in the event that with the opening of the hatch and the consequent introduction of oxygen into the compartment the fire should flare up and damage cargo in adjacent compartments.

Cargo also contended and presented evidence at the trial that a hole which was drilled through the bulkhead between the compartment on fire and the compartment containing the Westinghouse rotors so as to enable the fire to be observed should have been adequately plugged to prevent water flowing through the bulkhead in the event the fire rekindled on the hatch being opened, making it necessary to flood the hold.

These and other precautions cargo contended were necessary were not taken and when the fire flared on the opening of the hatch water used to flood the hold to extinguish the fire damaged the Westinghouse rotors and other cargo stowed in the adjacent hatch.

The District Court made no finding as to whether the fire fighting tactics were negligent as it found that the master had directed the fire fighting and management's suggestions and participation in the fire fighting activities did not constitute control so as to attribute the fire fighting activities to management, a necessary circumstance to establish "design or neglect" and to defeat the carrier's defense under the Fire Statute (35a, 57a).

The Fifth Circuit affirmed, ruling that the carrier could not in any event be held liable for negligent fire fighting tactics unless its supervision of the master were also negligent. The Circuit held that the fact that the master had safely brought the vessel to port and the crew and vessel and most of the cargo were saved, established that supervision was not negligent (37a).

This ruling appears to misconstrue the Fire Statute in light of management's obvious ability to control the tactics employed by the master to fight the fire, giving rise to the second question presented.

The carriage was governed by COGSA whose §1304(1) places on a carrier which would escape liability for unseaworthiness the burden of proving due diligence. As improper stowage constitutes unseaworthiness and the duty to stow properly is non-delegable, the Circuit considered the question whether the burden of proof in respect of due diligence falls in spite of COGSA §1304(1) on cargo when the loss was caused by fire. The Circuit reviewed the decision of the Ninth Circuit in *Sunkist Growers, Inc. v. Adelaide Shipping Lines, Ltd.*, 603 F. 2d 1327 (9th Cir. 1979), *cert. denied*, 444 U.S. 1012 (1980) holding that the burden remains on the carrier regardless of the cause of loss, and made the comment that cargo would prevail in this case if the Ninth Circuit's ruling were correct (734 F. 2d at p. 209). The Court refused to go along with the

decision, however, following instead the Second Circuit's contrary ruling in *Complaint of Ta Chi Navigation (Panama) Corp., S.A.*, 677 F. 2d 225 (2d Cir. 1982). In disputing the correctness of the opposing position, the Second and Ninth Circuit Judges expressed strongly emotional views (603 F. 2d at p. 1335; 677 F. 2d at p. 229). The Ninth Circuit position is in accord with British interpretation of the comparable Canadian Water Carriage of Goods by Sea Act. This conflict gives rise to the third question presented.

The District Court found that the fire was caused by ignition of cotton by a spark generated by the breaking of a turnbuckle due to excessive strain produced by the movement of the pipe stow with the rolling of the vessel (54a). It based this finding on common sense, circumstantial evidence and expert opinion based on the standard laid down by the Second Circuit in *Minerals & Chemicals Philipp Corp. v. S.S. National Trader*, 445 F. 2d 831 (2d Cir. 1971) (53a-54a). The Fifth Circuit applying a different standard, reversed holding that expert opinion as to cause is not entitled to consideration as unhelpful speculation and that proof of cause by circumstantial evidence constitutes an impossible burden for cargo to carry (27a-34a), giving rise to the fourth question presented.

Jurisdiction of the District Court was based on 28 U.S.C.A. §1333.

Reasons for Granting the Writ

Although the case involves cargo's right to recover from the carrier for losses resulting from fire, one of its issues is of broader application as it is relevant to both Fire and Limitation Statutes (46 U.S.C.A. §§181-189). With respect to several other of its issues there is conflict between Circuits.

The issue common to Fire and Limitation Statutes is the proper interpretation to be given the phrases "design or neglect" and "fault of privity" in light of modern communications and travel capabilities. Both phrases have been held to have the same meaning. Gilmore and Black, *The Law of Admiralty*, (2d ed. 1975) at page 879. The intent of the Statutes is to exercise or restrict the owner's liability for negligence when the vessel is not subject to his control.

The owner's responsibility for proper loading.

Professors Gilmore and Black of the Yale Law School referring to the Limitation Statute, wrote in *The Law of Admiralty* (2d ed. 1975) at page 894, "It is certainly true that the older case law assumed that the vessel had passed beyond the owner's effective control once it had broken ground for the voyage, so that he should not be stripped of the protection of the Limitation Act with respect to events which he could not, in fact, control. Instantaneous worldwide communications and the airplane have of course largely destroyed the factual assumption on which the older case law rested. We may assume that the case law will gradually reflect the technology of the twentieth century and that corporate shipowners will be held to a duty of exercising control over their voyaging ships to the extent that it is reasonably possible for them to do so." In this connection, they wrote that "It may be that the beginning of such case-law shift can be traced back to two notable cases on improper loading decided in 1943 and 1953." However, after reviewing fire and limitation cases applicable to the issue, they concluded, at p. 895, that "In light of the sequence of cases reviewed in this note, it would be foolhardy to say that the present

state of the law as to owner's responsibility for improper loading is clear."

We respectfully suggest that the decision of the Fifth Circuit herein adds to the existing lack of clarity with respect to owner's responsibility for loading as it struck down the District Court's finding that the carrier's management should have known that access to cargo whose securing devices should be checked periodically during the voyage was to be blocked (734 F.2d at p. 210, 23a-24a). The finding was supported by evidence that the plan for stowage of cargo aboard the vessel was conceived in the Home Office at New Orleans as were all stowage plans; that it was the usual and long-standing practice of the carrier to block access by stowing cargo on top of man-hole covers; that this plan clearly indicated for all to see that cargo was to be stowed on top of access man-holes and that the compartment immediately below would be stowed with hazardous cotton and pipe secured by chains and turnbuckles. In striking down the finding that management should have known that the access was to be blocked under those circumstances, the Circuit held that a carrier cannot be held liable under the Fire statute for improper stowage unless it is shown that a person having "a broad range of corporate authority" was involved in the decision to block the access on the voyage of the fire (734 F.2d at p. 211; 24a-25a).

This narrow interpretation of the design or neglect requirement seems clearly to conflict with the ruling by the Second Circuit (per L. Hand, J.) that "The measure [of knowledge] is not what the owner knows, but what he is charged with finding out." *Great Atlantic & Pacific Tea Co. v. Lloyd Brasileiro*, 159 F. 2d 661, 665 (2d Cir.) *cert denied, sub nom., Lloyd Brasileiro v. Great Atlantic & Pacific Tea Co.*, 331 U.S. 836 (1947). Citing that case, the Second Circuit subsequently held in *Verbeeck v.*

Black Diamond Steamship Corp., 269 F. 2d 68, 71 (2d Cir. 1959), *cert. denied, sub nom. Skibs A/S Jolund v. American Smelting & Refining Co.*, 361 U.S. 934 (1960) that use by the carrier of an improper stowage method for over 30 years was sufficient to establish neglect of the owner without proof that its managers were aware of the practice. The Court ruled at p. 71 that "Liability may not be avoided by speculation as to the extent to which the officers of the managing company kept themselves in ignorance of its business."

As the stowage which blocked the access was planned by the carrier's Home Office at New Orleans, there was no distance factor which might limit the obligation of management to find out and the owner placed no reliance on the master. See *Petition of Kinsman Transit Company* (The Shiras), 338 F. 2d 708 (2d Cir. 1964), *certiorari denied, sub, nom., Continental Grain Co. v. City of Buffalo*, 380 U.S. 944 (1965), wherein Judge Friendly commented that by virtue of this Court's decision in *Spencer Kellogg & Sons, Inc. v. Hicks* (The Linseed King), 285 U.S. 502, 52 S. Ct. 450 (1932), the owner would have been denied limitation if its office, instead of being in Cleveland, had been in Buffalo where the disaster occurred. He wrote with respect to the significance of location of office in relation to the place of accident that: "[O]ne might query the good sense of [such] a distinction . . . in this age of rapid communication and transportation . . . Indeed the whole rationale of the doctrine is of questionable application in a case like this where there was no need for the owner to rely on the skill of a master or other agents as he must when a vessel is at sea or in a distant port. All this, however, is not for us; shipowners and their insurers are entitled to rely on the statute and the decisions applying it, and we must take these as we find them until higher authority intervenes." Professors Gilmore

and Black in *The Law of Admiralty* (2d ed. 1975) at p. 890, comment: "Judge Friendly's discussion of the limitation issue reads suspiciously like an invitation to the Supreme Court to grant certiorari and reverse; if that is what he was about, he was doomed to disappointment, since certiorari was routinely denied."

The law as to the owner's responsibility for improper stowage thus remains clouded and requires clarification by this Court to remove the conflict between the Second and Fifth Circuits as to whether there is liability if it is found that management should have known that the stowage was improper.

Design or neglect with respect to extinguishment of the Fire.

We respectfully suggest that the view expressed by Judge Friendly and Professors Gilmore and Black that the older case law is inappropriate in light of modern communications and travel capabilities, is pertinent to another aspect of this case, the extinguishment of the fire at El Ferrol.

The port where the small smoldering fire was to be extinguished, being in Spain, was at a considerable distance from the carrier's Home Office at New Orleans. However, there was no need to depend solely on the master's judgment as he was able by telephone to and did report daily to corporate officers at New Orleans as to the state of the fire and the plans for extinguishing it. The planned procedure had the approval of both the Home Office and the New Orleans supervising port engineer who was at El Ferrol and had been sent there because of his prior experience with shipboard fires and his supposed fire fighting expertise. The Home Office

made suggestions and the port engineer physically took part in carrying out the plan. Clearly management had the capability to control what was to take place as the Circuit Court conceded that the master could have been relieved of his command if he declined to follow management's suggestions (734 F.2d at p. 215; 35a-36a). Management's ability to evaluate the procedure to be employed in extinguishing the fire, and to direct that changes be made, if deemed necessary, was not materially different because the vessel was at El Ferrol rather than at New Orleans when the fire was to be extinguished.

The Circuit Court emphasized that the vessel was at a foreign port whose authorities had to be satisfied (734 F. 2d at p. 216; 36a-37a). This would be true whether the port was domestic or foreign and whether management or master were in charge of putting out the fire. There was no evidence that the authorities made any demands which were contrary to the procedures cargo contends should have been followed.

The District Court held, nevertheless, that neither the suggestions made by the Home Office nor the active assistance at El Ferrol of the carrier's New Orleans supervisory port engineer constituted control so as to render management responsible for the fire fighting activities. (734 F.2d at p. 215, n. 10; 35a, n. 10). As indicated in the finding, the District Court held as a consequence that it was unnecessary to determine whether the fire fighting tactics were negligent and it made no such determination.

In its cross-appeal on the issue, cargo contended that the carrier's COGSA imposed duty to care for the cargo (46 U.S.C. §1303(2)) continues until delivery is made at destination and there is no suspension of the duty during a fire. The Second and Ninth Circuits have so held. *Great Atlantic & Pacific Tea Co. v. Lloyd Brasileiro, supra*, and

American Mail Line, Ltd. v. Tokyo Marine & Fire Ins. Co., 270 F. 2d 499 (9th Cir. 1959). Thus, in those Circuits, failure of management to make an appropriate assessment of the situation and to direct the master to take proper steps to fight fire will defeat the carrier's fire defense.

The Fifth Circuit disagrees in its decision herein and holds that the fire defense has a much broader effect in protecting the carrier from liability. It rejects the view that management, able to control the fire fighting tactics, is negligent if the tactics are negligent. It ruled that "even if some aspect of the fire fighting was negligent, such negligence would not be attributable to the owner." (734 F. 2d at p. 216; 37a). The only circumstance under which the fire defense can be defeated according to the Fifth Circuit's interpretation is if management's supervision of the master were negligent. (734 F. 2d at p. 216; 37a). Apparently this cannot occur if the master has safely brought the vessel to port, the crew and most of the cargo are saved and the vessel is able to complete the voyage (734 F. 2d at p. 216; 37a). It is immaterial to the consideration whether supervision was proper, that some of the cargo in substantial degree uninsured suffered heavy financial loss because of the failure among others to follow the basic tenet that cargo in adjacent holds should be discharged before a hatch containing a smoldering fire is opened in the event that entry of oxygen may cause the fire to flare up, which is what occurred here.

We respectfully suggest that the rule laid down by the Fifth Circuit in this case that loss sustained by cargo through negligent fire fighting tactics which the carrier's management had the capability of controlling is not recoverable unless management became aware of any "unwise course of action taken by the master" prior to the fire, is in conflict with the standard applied by the Second and Ninth Circuits and misconstrues the Fire Statute and the carrier's obligations under COGSA.

Burden of proof.

This Court has not accepted a fire case for over 40 years, the last being *Consumers Import Co., et al. v. Kabushikiki Kaisha Kawasaki Zosenjo, et al.*, 320 U.S. 249 (1943), involving the issue whether the Fire Statute protects only the owner or the vessel as well. The Court has never decided a fire case arising under COGSA, 46 U.S.C.A. §§1300-1315, the statute which governs the carriage of most goods in international trade and to which the goods were subject in this case. This point is significant as there is a sharp and heated conflict between the Second and Ninth Circuits as to the effect of COGSA on a carrier's liability for fire where the fire was caused by unseaworthiness existing at the start of the voyage. *Complaint of Ta Chi Navigation (Panama) Corp., S.A.*, 677 F. 2d 225 (2d Cir. 1982); *Sunkist Growers, Inc. v. Adelaide Shipping Lines, Ltd.*, 603 F. 2d 1327 (9th Cir. 1979), *cert. denied*, 444 U.S. 1012 (1980). The British cases construing the Canadian Water Carriage of Goods by Sea Act are in accord with the Ninth Circuit's view. *Maxine Footwear Co., Ltd. v. Canadian Government Merchant Marine, Ltd.*, [1959] A.C. 589; *The Anglo-Indian*, 1944 A.M.C. 1407. The Fifth Circuit sides with the Second Circuit, but comments that cargo would win in this case, if the Ninth Circuit is correct (734 F. 2d at pp. 207, 209; 16a; 21a).

Proof of cause of fire.

Another conflict between Circuits exists with respect to the nature and quantum of proof required to establish the cause of the fire.

In *Minerals & Chemicals Philipp Corp. v. S.S. National Trader*, 445 F. 2d 831 (2d Cir. 1971), the Second Circuit

held that the cause of fire may be established "through a combination of common sense, circumstantial evidence and expert testimony". Following this standard, the District Court found the cause of fire herein to be the breaking of a turnbuckle securing a stow of pipe (734 F. 2d at p. 212; 28a). All but one factual witness testified live at the trial.

Reviewing the evidence in light of the premise that the Fire Statute places on cargo a burden that is impossible to bear (734 F.2d at p. 214; 32a). The Circuit held that the proof as to cause was deficient in various respects which had not been questioned by counsel for the carrier on the appeal. Thus, the points were not briefed by us, although we believe they were not well taken. Moreover, opposing counsel were highly experienced and were present at the trial, and it does not seem unreasonable to assume that, in attacking the finding as to cause, they would have failed to mention any supposed deficiencies they deemed tenable. It may be questioned whether the setting aside, under these circumstances, of a finding fact derived from live testimony at the trial falls within the proper scope of appellate review.

The Fifth Circuit also totally rejected expert opinion as to cause, though undisputed in this case, as unacceptable speculation (p. 214; 32a-33a).

It thus seems clear that the Second and Fifth Circuits hold different attitudes toward the weight to be given circumstantial evidence and expert opinion as to the cause of the fire, the Fifth Circuit mandating an exceedingly conservative approach by the trier of fact probably making it impossible for cargo to win a fire case in that Circuit, and the former mandating a more lenient standard, making it possible for cargo to win on the same evidence in the Second Circuit.

The standards applicable in the Second and Fifth Circuits as to proof of cause are obviously inconsistent. Whether the intention of the Fire Statute was to defeat all cargo claims and whether expert testimony is to be ignored, would seem to be issues properly to be decided by this Court to ensure more evenness of result in future cases irrespective of the Circuit in which they may be brought.

CONCLUSION

For these reasons, a writ of *cetiorari* should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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October 9, 1984

[APPENDICES FOLLOW]



APPENDIX A

Opinion of the United States Court of Appeals for the Fifth Circuit

(Filed—June 14, 1984)

WESTINGHOUSE ELECTRIC CORPORATION, et al.,
Plaintiffs-Appellees Cross-Appellants,

v.

M/V "LESLIE LYKES", etc., Defendant,
Lykes Bros. Steamship Co., Inc., Defendant-Appellant
Cross-Appellee.

No. 82-3128.

United States Court of Appeals, Fifth Circuit.

June 14, 1984.

Appeals from the United States District Court for the
Eastern District of Louisiana.

Before BROWN, WISDOM and JOHNSON, Circuit
Judges.

JOHN R. BROWN, Circuit Judge:

This is a suit by a shipper of cargo against an ocean carrier for damage to cargo resulting from a fire aboard ship. One issue concerns the effect of an unseaworthy condition on the burden of proof in a carrier's defense under the Fire Statute, 46 U.S.C. § 182, which requires

Appendix A

that the fire be caused by the "design or neglect" of the owner, and under the Carriage of Goods by Sea Act, 46 U.S.C. § 1304(2)(b). After a traditional bench trial, the District Court held that the carrier was not entitled to the exoneration provided by the Fire Statute, because it found the fire to have been "attributable to the management level of Lykes." Because the District Court's factfinding was influenced by a view of the Fire Statute that we reject, and its findings did not center on the essential element that the fire must have been caused by the "design or neglect" of the shipowner, we reverse the decree in favor of Cargo. We also reject Cargo's purported cross-appeal of the trial court's conclusion that the Master's decisions in fighting the fire were not attributable to the owner under the Fire Statute.

Facts and Decision Below

In August of 1976, Westinghouse Electric Corp. (*Cargo*) shipped several large electric rotors aboard the SS LESLIE LYKES (LESLIE) owned by Lykes Brothers Steamship Co., Inc. (Carrier). The LESLIE was an ocean-going steamship used to transport break-bulk or general cargo.

The LESLIE contains six cargo holds. The No. 3 hold is divided into three horizontal compartments. The bottom compartment is the lower hold, also referred to as the dry cargo hold. Above the lower hold is the lower tween deck (LTD), in which the fire occurred. The top compartment is the upper tween deck, which is immediately below the main deck or weather deck. Each deck has a MacGregor hatch cover, which opens in accordion fashion, consisting of panels attached by

Appendix A

hinges, positioned on rollers. The hatch covers are activated hydraulically.

The No. 2 hold, which is immediately forward of No. 3 hold, has the same overall structure as No. 3. Both No. 2 and No. 3 contained a vertical ladder running the depth of the ship. At each level or compartment was a manhole for entry into the next deck via the ladder. One purpose of these accessways was to allow the crew to take periodic checks to confirm the security of the cargo. The accessway manhole in the No. 3 hold was at the forward bulkhead between No. 3 and No. 2 holds. The accessway in the No. 2 was aft, also at the bulkhead between No. 3 and No. 2 holds. The entrance to No. 3 manhole is at the top of the motor/generator house located on the weatherdeck.

The No. 4 hold was situated immediately aft No. 3 hold. Unlike holds No. 2 and No. 3, hold No. 4 was divided into three vertical compartments so that containers could be stowed within the hold. The vertical divisions ran fore and aft. The accessway in No. 4 was located at the forward bulkhead between the No. 4 and No. 3 holds.

On the voyage in question (Voyage 64), two Westinghouse rotors were being shipped in separate containers in No. 4 hold. In addition to this cargo, bags of flour were stowed in open spaces in No. 4 hold.

Among the cargo stowed in the No. 3 LTD were bales of cotton. Cotton is flammable and, if ignited, is very difficult to extinguish. Baled cotton can smolder indefinitely, even under water, because there is a source of oxygen within the cotton fibers themselves. Between the starboard bulkhead and the cotton was a stow of drill

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pipe running fore and aft. The pipe stow was secured properly by chains, which were tightened by turnbuckles.

The LESLIE sailed from her last port of call (Charleston, South Carolina) on the evening of August 27, 1976. On August 29th, the vessel encountered rough weather, the seas rolling heavily due to the fact that the vessel was sailing on the edge of a hurrican. Though the weather was rough, it was not unusual or unexpected.

At 2315 hours on August 31, 1976, a clanking noise was heard by members of the crew, which they believed at the time had come from the No. 4 hold. No attempt was made by the crew to investigate the clanking sound at that time, even though there was access into No. 4. At the time the noise was heard, the vessel was still sailing in rough seas.

At 1212 hours on the following day, roughly twelve and one-half hours after the clanking was heard, smoke was observed from the bridge by Captain Metcalf, master of the vessel, coming from the kingpost forward of the No. 3 hold. The smoke detector system indicated that a fire was in the No. 3 LTD. Although an access way was provided in No. 3 hold, access could not be obtained into No. 3 LTD because bags of flour had been stowed over the manhole cover in No. 3 upper tween deck.

A thermometer was placed in the No. 4 hold at the hottest spot on the bulkhead between No. 4 and No. 3, in order to monitor the temperature and status of the fire. The thermometer placed at the starboard side of the forward bulkhead of No. 4 hold originally indicated a temperature of 130 degrees. The bulkhead temperatures indicated that the fire was in the vicinity of the starboard aft section of No. 3 LTD, where the cotton and drill pipes had been stowed.

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The vessel was equipped with a CO₂ injection system in each hold. Therefore, the weatherdeck hatch of the No. 3 hold was sealed with tape to prevent as much as possible the leakage of CO₂. Also, the blowers of the vessel's ventilator system were shut off and taped to avoid providing the fire any ventilation.

Captain Metcalf ordered the release of 24 bottles of CO₂ into No. 3 LTD, in accordance with the directions provided by the manufacturer of the CO₂ system. Pursuant to those instructions, the crew continued to introduce CO₂ into No. 3 LTD until the vessel arrived at El Ferrol, Spain, at which time the thermometer that had been placed on the bulkhead indicated the temperature had dropped to 110 degrees.

Soon after the introduction of CO₂, the smoke abated, as indicated by the smoke detector. Neither the smoke detector nor the kingpost ventilator revealed any indication of smoke from September 1st until the opening of the No. 3 weatherdeck hatch at El Ferrol on September 8.

The vessel had left Charleston with 72 full cannisters of CO₂. By the time is reached El Ferrol, only 2 cannisters remained full. Due to the concern that the supply of CO₂ might run low, steam was introduced into No. 3 LTD, in addition to the insertion of CO₂ into the compartment. This was accompanied by drilling five 1/2- to 3/4-inch holes in the bulkhead of No. 4 hold just above the location of the stow of drilling pipes located in No. 3 LTD. Steam lances were inserted into the holes.

While at sea, Captain Metcalf discussed the events taking place with Lykes' managing personnel at New

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Orleans by radiotelephone each day, from the time fire was first detected. He considered and followed some suggestions for fighting the fire made by Lykes' vice-president in charge of maintenance and repair, Joseph Bernstein.

Mr. Lucian Castro, then a supervisory port engineer for Lykes in New Orleans, was sent to meet the vessel at El Ferrol for the purpose of rendering the master any assistance and advice that he could. Castro was sent because he was considered to be knowledgeable and experienced in cotton fires. Castro prepared himself for the journey and task by reviewing the stowage plan for the voyage, the vessel's CO₂ system, and bringing available foam and other chemicals for extinguishing cotton fires.

When the vessel arrived at El Ferrol on September 6 at about 1818 hours, Captain Metcalf held an informal meeting in his cabin to discuss what action would be taken. Numerous Spanish firefighting authorities and port officials, including representatives of the Spanish Navy and the Navy's firefighting school, were present. Also attending were Castro and the ship's chief engineer.

Captain Metcalf decided at the conclusion of the meeting that an access hole would be cut in the bulkhead between No. 3 and No. 4 holds, at the point of highest temperature. This was done in order to see into the No. 3 LTD, inspect the status of the fire and, if necessary, fight the fire from its own level through the access hole.

The access hole was cut in the same location on the bulkhead where the steam lance holes had been drilled, beneath an athwartship walkway which ran along the

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forward bulkhead in No. 4 hold. In order to cut the hole, which was accomplished by drilling several contiguous holes, bags of flour stored in the No. 4 hold were moved to provide sufficient work space. A cover was made for the approximately 18" by 24" access hole in an attempt to keep the compartment as airtight as possible.

After the access hole was completed, on September 7th, Castro and John Ebanks, the boatswain, attempted entry through the access hole in order to assess the status of the fire. Hoses were run from the vessel's compressed air supply, through a makeshift filter consisting of paper and a miner's type mask, in order to afford them adequate air supply.

Ebanks successfully entered No. 3 LTD and Castro partially entered. After entering the hold, Ebanks stood on top of the drill pipe stow in order to look around. He then sprayed water over the cargo in the compartment to see if smoke would rise, in order to establish the existence or nonexistence of a fire. No signs of smoke were visible to either party.

Due to the extreme heat, Castro ordered the ventilator system's fan turned on momentarily. As a result, No. 3 LTD compartment became pressurized and CO₂ was forced out of the compartment into No. 4 hold. Members of the crew standing by in No. 4 hold were overcome by the gas as a result of not wearing masks. Additionally, Castro, whose mask became dislodged when he turned to leave the area, passed out and was taken to the hospital. Ebanks was also overcome due to the fact that the hose to his mask did not reach as far as he

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had ventured at the time the compartment was pressurized.¹

Shortly after evacuation of the crew members from No. 4 hold, foam was introduced into No. 3 LTD compartment via the access hole. The foam was designed to accomplish the same thing as CO₂, namely, to keep oxygen from the fire. This was done by the Spanish Navy Fire Control Unit about 3½ hours after the entry of the boatswain into the compartment.

On the following morning, September 8th, at 0905 hours, the weatherdeck hatchcover of No. 3 hold, leading into No. 3 upper tween deck, was opened. When the hatch cover was first opened, little smoke was seen. The Spanish firefighters, there to assist in fighting the fire, entered the upper tween deck and removed two pieces of heavy lift equipment so that the hatch cover over the lower tween deck could be opened. The heavy lifts prevented entry because they were stored over the hatch cover.

As attempts to open the hatch cover over No. 3 LTD commenced, smoke was seen emanating from the compartment below through the cracks between the sections of the hatch cover. Before the hatch cover could be completely opened a "whoosh" was heard and flame erupted from the hold, followed by a dull explosion. Firefighters immediately began flooding No. 3 hold with hoses from the top and from the bottom through the use of bilge pumps.

At about the same time that the flooding of No. 3 hold commenced, smoke was detected in both No. 4 and No. 2

¹ This incident was the subject of personal injury suits by several crewmen. *Ivano v. Lykes Brothers*, 729 F.2d 778 (5th Cir. 1984) (unpublished opinion).

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holds. Those fires had been caused by the conduction of heat through the No. 3 bulkheads. By that time, the fire in No. 3 hold had spread throughout most of the compartment. Stored near the bulkheads in each hold were bags of flour. Fire hoses were placed in the access manhole of No. 4 hold and tied to secure a direct stream toward the forward bulkhead, where it was believed the fire was coming from. Hoses were also used to fight the fire in No. 2 hold.

Both No. 3 and No. 4 holds were filled with salt water, inundating the Westinghouse rotors. Thus, some of the ship's cargo was badly damaged, if not ruined. Nevertheless, the firefighting efforts extinguished the fire, saved the lives of the crew, the ship, and most of the cargo, including some of Westinghouse's cargo.

After the fire was extinguished and the holds were emptied of water, a turnbuckle securing one of three chains surrounding the pipe stow in the starboard side of No. 3 LTD was found to have been broken. The remaining two chains securing the starboard pipe stow were unbroken and still held the stow intact.

Cargo brought an action against Carrier for damage to its cargo, and Carrier asserted the defense of the Fire Statute,² which was preserved and incorporated into

² The Fire Statute provides:

No owner of any vessel shall be liable to answer for or make good to any person any loss or damage, which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner. R.S. § 4282.

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the Carriage of Goods By Sea Act.³ The District Court explained that, under the reasoning of *Sukist Growers v. Adelaide Shipping Lines, Ltd.*, 603 F.2d 1327 (9th Cir. 1979), the Carrier may not be exonerated under the Fire Statute unless he first bears the burden of proving that he used due diligence to provide a seaworthy ship or that

³ The Carriage of Goods By Sea Act provides:

(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

* * *

(b) *Fire*, unless caused by the actual fault or privity of the carrier;

46 U.S.C. § 1304(2)(b).

The Carriage of Goods By Sea Act specifically incorporates and carries forward the terms of the Fire Statute. Even more important, COGSA § 1308 expressly provides that other provisions of the Act (*see, e.g.*, § 1303(1), (2)) shall not affect the rights and obligations of the Carrier under the Fire Statute (§ 182).

The provisions of this chapter shall not affect the rights and obligations of the carrier under the provisions of the Shipping Act, 1916, or under the provisions of sections 175, 181 to 183, and 183b to 188 of this title or of any amendments thereto; or under the provisions of any other enactment for the time being in force relating to the limitation of the liability of the owners of seagoing vessels.

46 U.S.C. § 1308.

It has long been held that the COGSA fire exemption and the Fire Statute exemption are the same, *e.g. Complaint of Ta Chi Navigation (Panama) Corp.*, 677 F.2d 225, 228 (2d Cir. 1982), except that COGSA extends to the "carrier," not just the "owner" as in the Fire Statute. *See* 2A Benedict on Admiralty § 147 (7th ed. 1983).

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any unseaworthy condition did not cause the fire and resulting damage. Pursuing this approach, the District Court concluded

“that Lykes failed to exercise due diligence in providing a seaworthy vessel in its stowing bags of flour over the manhole access way to No. 3 lower tween deck. The manhole was not fit for its intended use, and as a result, rendered the LESLIE LYKES unseaworthy. This unseaworthy condition was a proximate cause of the fire and resulting damage to the cargo. . . . Thus, under the holding *Sunkist Growers* Lykes would be barred from asserting the fire defense.

The District Court alternatively cited older Supreme Court and Fifth Circuit cases which squarely hold that proof of due diligence to make the vessel seaworthy is not a precondition to the exoneration provided by the Fire Statute. This did not change the result below, because the District Court, as if to reason

For want of a nail, the shoe was lost;

For want of a shoe, the horse was lost;

For want of a horse, the rider was lost;

For want of a rider, the battle was lost,

found, “through a combination of common sense, circumstantial evidence and expert testimony,” that Cargo had carried its burden imposed by the Fire Statute by proving that the damage to its cargo

was caused by the fire fighting efforts,

which were caused by the fire,

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which was caused by a spark emitted from the broken turnbuckle,

which was caused by the looseness of the chain,

which was caused by the failure of the crew to tighten the turnbuckle during the voyage,

which was caused by the failure of the crew to enter No. 3 LTD during the voyage,

which was caused by the lack of access into No. 3 LTD without removing flour sacks,

which was caused by the covering of the access manhole,

which was caused by the stowage plan,

which was caused by the cargo planners in Lykes' New Orleans office,

which decision by the cargo planners was negligence, and was within the "actual fault or privity" of the owners of the LESLIE.

The District Court found it unnecessary to decide whether the elaborate firefighting efforts were negligent, because it found that they were controlled, at sea and in the foreign port, by the Master, not by Castro or Bernstein. Thus, the decisions made in the firefighting process were not caused by the "actual fault or privity" of the owners of the vessel.

Lykes appeals contending that (1) there was no proof that the fire (or fire damage) was caused by the "design or neglect" of the owner, and (2) the trial court erroneously relied on the Ninth Circuit's decision in *Sunkist*. Cargo filed a purported "protective cross appeal"

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to preserve for appeal, if we reversed the District Court on the Fire Statute, its objection to the District Court's finding that the firefighting decisions—and practices—were not attributable to the owner.

Proof Under the Fire Statute

An improper analysis of the burden of proof, and more importantly, of *what must be proven* to overcome the fire defense sparked the District Court into finding an extremely loose chain of causation, which, if accepted, would convert virtually any unseaworthy condition into "actual fault or privity" of the owner.

In a maritime cargo claim, the initial burden is on Cargo (shipper) to prove "good order-bad order"—that he delivered the goods to the carrier in apparent good order and condition and that, upon return, they were damaged. 46 U.S.C. § 1303(4); *Blasser Bros., Inc. v. Northern Pan-American Line*, 628 F.2d 376 (5th Cir. 1980); *Terman Foods, Inc. v. Omega Lines*, 707 F.2d 1225 (11th Cir. 1983). Once Cargo has done so, the burden shifts to the Carrier to prove that the harm was caused by one of the statutorily excepted causes. 46 U.S.C. §§ 1302, 4(2); 46 U.S.C. § 182; 628 F.2d at 381. Loss resulting from fire is one of these perils excepted (more so than other perils) from the general liability of the carrier for damage sustained while the goods are in his possession. 46 U.S.C. § 1304(2)(b); 46 U.S.C. § 182. There is no doubt that in this case Cargo has proved good order-bad order, and that Carrier has proved that the loss resulted from fire. Once a fire exists, the defense of fire also protects the Carrier from losses resulting from steps taken to extinguish

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the fire, provided there is no actual fault or privity of the owner concerning the firefighting efforts. *Thede, Limitation of Liability and the Fire Statute*, 45 Tul.L.Rev. 959, 981 (1971). See, e.g., *Complaint of Caldas*, 350 F. Supp. 566 (E.D. Pa. 1972), *aff'd*, 485 F.2d 680 (3d Cir. 1973); *Great Atlantic & Pacific Tea Co. v. Brasileiro*, 159 F.2d 661 (2d Cir. 1947); *La Territorial De Seguros v. Shepard SS Co.*, 124 F.Supp. 287, 289 (E.D.N.Y. 1954).

Once the Carrier shows that the loss or damage was caused by fire, the burden of proof shifts back onto Cargo to prove that the fire was "caused by the design or neglect" of the shipowner. Thus, the burden is on the Cargo to identify by a preponderance of the evidence the cause of the fire, and also to establish that the cause was due to the "actual fault or privity" of the Carrier. Comment, *The Elements of the Burden of the Proof under the Carriage of Goods By Sea Act*, 12 Colum.J.Trans.L. 289, 298 (1973); *Thede, supra*, 45 Tul.L.Rev. at 985; 2A Benedict on Admiralty § 143 (7th ed. 1983) (citing cases); *Fidelity Phenix Fire Ins. Co. v. Flota Mercante Del Estado*, 205 F.2d 886, 887 (5th Cir. 1953); *Complaint of Ta Chi Navigation (Parama) Corp.*, 677 F.2d 225, 228 (2d Cir. 1982); *Asbestos Corp. v. Compagnie De Navigation*, 480 F.2d 669, 672-73 (2d Cir. 1973). See *Blasser Bros. Northern Pan-American Line*, 628 F.2d 376, 382 (5th Cir. 1980); *Nitram, Inc. v. Cretan Life*, 599 F.2d 1359, 1373 (5th Cir. 1979). Moreover, Cargo's burden is not satisfied by proving that the fire was caused by the negligence of the master or crew. "Neglect of such owner" means personal neglect of the owner, or, in case of a corporate owner, negligence of its managing officers or agents. *Earle & Stoddart, Inc. v. Ellerman's Wilson Line Ltd.*, 287 U.S. 420, 424-25, 53 S.Ct. 200, 200-01, 77 L.Ed. 403 (1932);

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Alfa Romeo, Inc. v. SS Torinita, 499 F.Supp. 1272, 1282 (S.D.N.Y. 1980), *aff'd*, 659 F.2d 1057 (2d Cir. 1981); *Complaint of Caldas*, 350 F.Supp. 566 (E.D. Pa. 1972), *aff'd*, 485 F.2d 680 (3d Cir. 1973).

Not following this time honored approach, the District Court instead⁴ emphasized the Ninth Circuit's decision in *Sunkist Growers, Inc. v. Adelaide Shipping Lines, Ltd.*, 603 F.2d 1327 (9th Cir. 1979), *cert. denied*, 444 U.S. 1012, 100 S.Ct. 659; 62 L.Ed.2d 640 (1980), and held that the burden of proof is on the Carrier to show that it exercised due diligence to provide a seaworthy ship as a precondition to invoking the defense of § 1304(2)(b) and the Fire Statute. 603 F.2d at 1336.

We need not look far upward to reject the Ninth Circuit's construction of the Fire Statute. In *Earle & Stoddart v. Ellerman's Wilson Line*, 287 U.S. 420, 53 S.Ct. 200, 77 L.Ed. 403 (1932), the very same argument was made and squarely rejected by the Supreme Court. There the Court explained:

⁴ The District Court declared:

The burden which the carrier must meet under this interpretation is that it exercised due diligence in providing a seaworthy ship or that any unseaworthiness was not attributable to lack of due diligence. *Sunkist Growers, Inc., supra*.

Under the Ninth Circuit's interpretation, if the carrier fails to establish that it acted in accordance with 46 U.S.C. § 1303, or that failure to do so did not cause the fire and resulting damage, the carrier is barred from asserting the fire exemptions as a defense. *Sunkist Growers, Inc. supra*. If the carrier does meet that burden, then the burden shifts to cargo to prove that the fire was caused by the "design or neglect" or the "fault or privity" of the carrier.

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But the Act does not purport to create any general duty on the part of shipowners. Its requirement of due diligence is imposed as a condition of securing immunity from liability for certain kinds of losses, like those due to errors in navigation or management. That the provisions of the Harter Act do not refer to liability for losses arising from fire is made clear by § 6 which declares that the Act "shall not be held to modify or repeal §§ 4281, 4282, and 4283 of the Revised Statutes,"—§ 4282 being the fire statute. *The courts have been carefull not to thwart the purpose of the fire statute by interpreting as "neglect" of the owners the breach of what in other connections is held to be a non-delegable duty.*

287 U.S. at 427, 53 S.Ct. at 201 (emphasis added). Because of this positive directive and the underlying policy of the Fire Statute, we join in the Second Circuit's recent emphatic rejection of *Sunkist*:

When Congress wanted to put the burden of proving freedom from fault on a shipowner claiming the benefit of an exemption, it specifically said so. See 46 U.S.C. § 1304(2)(q). The *Sunkist* court would read the language of subsection (q) into subsection (b), "although Congress did not put it there." See *Lekas & Drivas, Inc. v. Goulandris*, *supra*, 306 F.2d [426] at 432 [(2d Cir. 1962)]. This Court has not put it there either. We adhere to our prior holdings that, if the carrier shows that the damage was caused by fire, the shipper must prove that the carrier's negligence caused the fire or prevented its extinguishment. If on remand the shipper fails to meet this burden, the action must be dismissed.

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Complaint of Ta Chi Navigation (Panama) Corp., 677 F.2d 225, 229 (2d Cir. 1982). Moreover, this Court's own precedent is incompatible with the *Sunkist* interpretation. In *Fidelity-Phenix Fire Ins. Co. v. Flota Mercante Del Estado*, 205 F.2d 886 (5th Cir. 1953), we held:

It is well settled that a shipowner is not liable for damages resulting from fire unless libellant proves that the cause of the fire was due to the "design or neglect" of the owner, the burden being upon libellant.

205 F.2d at 887. In that case, Cargo had argued that the carrier should not have the advantage of the Fire Statute without first showing that the vessel had the proper equipment required by a safety statute. This Court answered:

But the fire statute is not by its terms so conditioned. In *Earle and Stoddart v. Ellerman's Wilson Line*, 287 U.S. 420, 53 S.Ct. 200, 77 L.Ed. 403 [1932] it was said: "The fire statute, in terms, relieves the owners from liability 'unless such fire is caused by the design or neglect of such owner.' The statute makes no other exception from the complete immunity granted."

205 F.2d at 888. Moreover, COGSA expressly provides that the obligation of the Carrier under § 1303(1) to exercise due diligence to make the ship seaworthy, or under (2) to properly load, handle, stow and care for cargo shall not affect the rights of the Carrier under the Fire Statute. 46 U.S.C. § 1308, *see note 3, supra*. Thus, clear authority compels our rejection of *Sunkist* and its interpretation of the Fire Statute that imposes an obligation of due dili-

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gence to make seaworthy on the shipowner and relieves the Cargo of its burden of proof on privity and fault causation.

Both Congress⁵ and the Supreme Court have made it clear that the Fire Statute is to be applied broadly, and the exception to the defense for fires "caused by the design or neglect of such owner" must be viewed narrowly. *E.g. Providence & New York S.S. Co. v. Hill Mfg. Co.*, 109 U.S. 578, 3 S.Ct. 379, 27 L.Ed. 1038 (1886). In that case the Court stated that if the Fire Statute "is administered with a tight and grudging hand, construing every clause most unfavorably against the shipowner, and allowing as little as possible to operate in his favor, the law will hardly be worth the trouble of its enactment." *Id.* at 589, 3 S.Ct. at 386. In its most recent pronouncement on the purpose of the Fire Statute, the Supreme Court explained that Congress intended for shippers and not carriers to pay for insurance coverage of fire losses to cargo.

It enabled the carrier to compete by offering a carriage rate that paid for carriage only, without loading it for fire liability. The shipper was free to carry his own fire risk, but if he did not care to do so it was well known

⁵ Congress has devised a very detailed scheme for the burden of proof in maritime cargo cases, *see generally* Comment, *The Elements of the Burden of Proof Under the Carriage of Goods by Sea Act*, 12 Colum. J. Trans. L. 289 (1973), that deliberately achieves a "ping pong" sort of shifting of the burden. 46 U.S.C. § 1304(2). *Nitram, Inc v. Cretan Life*, 599 F.2d 1359, 1373 (5th Cir. 1979).

As explained above, if the carrier satisfies his burden of showing loss by fire, the carrier will be exonerated if the cargo is unable to substantiate that it was caused by the "design or neglect" of the owner.

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that those who made a business of risk-taking would issue him a separate contract of fire insurance. Congress had simply severed the insurance features from the carriage features of sea transport and left the shipper to buy each separately. While it does not often come to the surface of the record in admiralty proceedings, we are not unaware that in commercial practice the shipper who buys carriage from the shipowner usually buys fire protection from an insurance company, thus obtaining in *two* contracts what once might have been embodied in one. *The purpose of the statute to relieve carriage rates of the insurance burden would be largely defeated if we were to adopt an interpretation which would enable cargo claimants* *[256] *and their subrogees to shift to the ship the risk of which Congress relieved the owner.* This would restore the insurance burden at least in large part to the cost of carriage and hamper the competitive opportunity it was purposed to foster by putting our law on an equal basis with that of England.

Consumer Import Company v. Kabushiki K.K. Zosenjo, 320 U.S. 249, 255, 64 S.Ct. 15, 18, 88 L.Ed. 30 (1943) (emphasis added). In so stating, the Court affirmed the decision by Judge Learned Hand in which he declared: "We must not clutch at . . . straws to find liability, or construe the Fire Statute grudgingly." 133 F.2d at 785.

Against this legal background, we examine the District Court's findings.

Design or Neglect of Such Owner

Accepting, *arguendo*, the trial court's finding that the cause of the fire was the covering of the manhole leading to No. 3 LTD with sacks of flour, and that such stowage

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was negligent in this case, we reject the Court's conclusion that such stowage was brought about by the "design or neglect" of the shipowner so as to overcome the fire defense.

The District Court reasoned as follows :

The uncontrovered testimony established that the cargo layout section in Lykes' head office in New Orleans was responsible for confecting the stowage plan for Lykes voyages. The vessel was loaded pursuant to that plan. The stowage plan for Voyage 64 indicates that bags of flour were to be stowed "all over" in the No. 3 upper tween deck, blocking the manhole to the accessway ladder in the No. 3 lower tween deck. The Court finds that Lykes' management knew or should have known of this practice. *It is the carrier's responsibility to make sure the vessel is properly loaded.* 46 U.S.C. § 1303(2). The Court concludes that the stowage of the bags of flour over the manhole was attributable to the management level of Lykes. *Consumers Import Company v. Kabushiki Kaisha Kawasaki Zosenjo* [320 U.S. 249] 64 S.Ct. 15 [88 L.Ed. 30] (1943). (Emphasis supplied).

Although we may accept the facts recited in this passage as supported by the record, we disagree with the Court's legal conclusions. It is plain that while asserting an alternative analysis on burden of proof, the Judge once again put primary reliance on the erroneous reasoning of *Sunkist* in his ruling on "design or neglect."

Although the District Court paid heed to *Earle & Stoddart* holding on who bears the burden of proof, it ignored the Supreme Court's ruling in *Earle & Stoddart* on *what the cargo must prove*. The italicized sentence in the foregoing quotation demonstrates that the District Court reasoned that the failure of the Carrier to "make sure the vessel is properly loaded . . . [under] 46 U.S.C. § 1303(2)"

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leads to the conclusion "that the stowage . . . was attributable to the management level of Lykes," and thus within Lykes' "design or neglect." If *Sunkist* were acceptable, this would be correct, because improper stowage constitutes unseaworthiness, and this would deprive the owner of the Fire Statute exemption under *Sunkist*. 603 F.2d at 1335-36.

However, the Supreme Court's opinion in *Earle & Stoddart* refutes *Sunkist* not only as to who bears the burden of proof, but also on what the cargo must prove to take the case out of the fire exemption. The cargo in *Earle & Stoddart* contended "that the [Fire] statute does not confer immunity where the fire resulted from unseaworthiness existing at the commencement of the voyage and . . . discoverable by due diligence." 287 U.S. at 425-26, 53 S.Ct. at 200-01. The Court flatly rejected this position, declaring: "The courts have been careful not to thwart the purpose of the fire statute by interpreting as "neglect" of the owners the breach of what in other connections is held to be a non-delegable duty." 287 U.S. at 427, 53 S.Ct. at 201.

This admonition is directly applicable here. The District Court interpreted as "neglect" of the owners the improper stowage of cargo by lower-level employees, which in a non-fire COGSA context would be a non-delegable duty of the carrier properly to load, stow and care for the cargo. 46 U.S.C. § 1303(2); *Agrico Chemical Co. v. S.S. Atlantic Forest*, 620 F.2d 487, 489 (5th Cir. 1980), *aff'g* 459 F.Supp. 638, 647 (E.D. La. 1978). In a COGSA case involving a defense other than fire, the Carrier is liable for the negligence of its servants or agents in the loading, handling, stowing, carrying, caring for, or discharging the cargo. *Id.* The District

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Court cited (see the quotation *supra*) *Consumers Import Company v. Kabushiki Kaisha Kawasaki Zosenjo*, 320 U.S. 249, 64 S.Ct. 15, 88 L.Ed. 30 (1943), in support of like reasoning in the context of the Fire Statute.

Actually, *Consumers Import* is directly contrary to the District Court's reasoning. There the Supreme Court pointed out:

The cause of the fire is found to be negligent stowage of the fish meal, which made the vessel unseaworthy. The negligence was that of a person employed to supervise loading to whom responsibility was properly delegated and who was qualified by experience to perform the work. No negligence or design of the owner or charterer is found.

* * * * *

Since "neglect of the owner" means his personal negligence, or in case of a corporate owner, negligence of its managing officers and agents as distinguished from that of the master or subordinates, the findings below take the case out of the only exception provided by statute.

320 U.S. at 250, 252, 64 S.Ct. at 16, 17. This holding in *Consumers Import* is particularly compelling in this case for two reasons. First, it is the Supreme Court's most recent word on the Fire Statute. Second, the negligence was, as in this case, by shore-based persons who were delegated the task of designing and planning the stowage. Because the delegees were not managerial agents with a broad range of responsibility in the corporation and because they were "qualified by experience to perform the work," such negligence was not the "design or neglect" of the owner.

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Other courts have reached the same conclusion with respect to the delegation of stowage decision in the context of the Fire Statute. *The Ocean Liberty*, 199 F.2d 134, 142-44 (4th Cir. 1952); *American Tobacco Co. v. The Katingo Hadjipatera*, 194 F.2d 449, 450 (2d Cir. 1951), *cert. denied*, 343 U.S. 978, 72 S.Ct. 1076, 96 L.Ed. 1370 (1952). For similar holdings on fires resulting from non-stowage negligence by non-managerial agents, see *Albina Engine & Machine Works, Inc. v. Hershey Chocolate Corp.*, 295 F.2d 619 (9th Cir. 1961); *Globe & Rutgers Fire Insurance Co. v. United States*, 105 F.2d 160 (2d Cir. 1939); *The Older*, 65 F.2d 359 (2d Cir. 1933). The effect of the Fire Statute on respondeat superior and delegation of duties has been summarized by a commentator in this field:

In Chapter 7 dealing with due diligence, it was pointed out that a carrier cannot avoid its statutory obligation to exercise due diligence to make its vessel seaworthy by delegating that obligation to another. However, that principle is inapplicable in cases where damage to cargo by fire is within the exemption of the Fire Statute. If a vessel owner delegates to an independent agency of good repute the duty of laying out and supervising the stowage of a vessel or making her seaworthy; or if the owner in this regard relies upon the ship's officers or other qualified minor employees who are not the owner's managing representatives; and the negligence of those delegees is the proximate cause of subsequent fire loss of cargo, that negligence does not of itself defeat the owner's right to the exemption of the Fire Statute.

H. Longley, *Common Carriage of Cargo*, 172-73 (1967), 2A Benedict on Admiralty § 146 (7th Ed. 1983). "The

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'largeness of authority' of the carrier's representatives determines whether his 'neglect' or 'actual fault or privity' defeats the application of the statutory exemptions." *Id.* at § 145. Thus, it is clear that under the Fire Statute the negligence of corporate subordinates is not as the District Court assumed, "attributable" to the "managing officers and agents" either by respondeat superior or by the concept of non-delegable duties.⁶

In this case, the evidence showed only that the stowage plan called for the manhole to be covered with sacks of flour and that the stowage plan had been prepared in the Lykes cargo layout department in New Orleans. As demonstrated above, the burden of proof was on the cargo to show that this stowage decision was within the "design or neglect" of the "managing officers and agents as distinguished from the master or subordinates" of Lykes. *See supra* p. 4172. Despite this burden, Cargo failed to present any evidence as to who within the layout department prepared this cargo plan and which, if any, supervisors checked and approved this person's work. There was no evidence of how many persons worked in this department, the various job categories and their corresponding spheres of authority, or the structure of the hierarchy leading from the layout personnel to the highest officers of the corporation. Nor was there any evidence

⁶ Of course, there may be "design or neglect" if the owner negligently hired a person to perform a task for which he is incompetent. *E.g., Skibs A/S Jolund v. Black Diamond S.S. Corp.*, 250 F. 2d 777 (2d Cir. 1957); *United States v. Charbonnier*, 45 F.2d 174 (4th Cir. 1930) (president of shipping corporation hired incompetent engineer even though not favorably impressed by interview). However, even in such cases, the negligence in hiring must be personal to a managing agent of the corporation.

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that anyone with a broad range of authority in Lykes knew that cargo which might require access during the voyage was being stowed in No. 3 LTD and that the manhole leading to that compartment was being covered by cargo.⁷

⁷ Cargo raises a great hue about the stowage of cotton bales without open access during the voyage as being a violation of Coast Guard regulations. The regulations are somewhat unclear. Although access for inspection during the voyage is generally a requirement for stowage of "dangerous articles," see 46 C.F.R. § 146.02-12 (1975), a broad category including "hazardous articles" see *id.* at § 146.03-8, which in turn includes cotton, see *id.* at § 146.27-1(c), § 146.27-100, special, detailed regulations have been promulgated for the stowage of cotton. 46 C.F.R. § 146.27-25. These extensive regulations particularly on cotton do not contain a requirement of access during the voyage. Because of the peculiar danger of fire, the regulations require a CO₂ or steam smothering system and also require that the hatch be closed and covered by tarpaulins to make a tight seal. *Id.* at § 146.27-25(b)(6)(c). These requirements were fulfilled in this case.

Perhaps because of this ambiguity, the District Court made no finding on any violation of Coast Guard regulations. However, we point out that if there had been a violation of safety regulations, this would not deprive the shipowner of its defense under the Fire Statute, unless Cargo proved that the shipowner or his managing agents were personally negligent in causing the violation that caused the fire damage. *Fidelity-Phenix Fire Ins. Co. v. Flota Mercante Del Estado*, 205 F.2d 886 (5th Cir. 1953), *cert. denied*, 346 U.S. 915, 74 S. Ct. 275, 98 L. Ed. 411; *Automobile Ins. Co. v. United Fruit Co.*, 224 F.2d 72 (2d Cir. 1955); *Compliant of Caldas*, 350 F.Supp. 566 (E. D. Pa. 1972), *aff'd* 485 F.2d 678 (3d Cir. 1973).

Cargo also makes much of an isolated portion of the Master's testimony in which he stated that the covering at times of access manholes was not uncommon throughout the shipping industry. The Master explained that access during the voyage is not needed for certain cargos, and that leaving an access passage in a stow

(Footnote continued on following page)

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Nor was there evidence of negligence in hiring an incompetent. Without such evidence showing a broad range of corporate authority in a person involved in the stowage decision, the District Court could not properly conclude that the improper stowage was within the personal "design or neglect" of the corporate owner. The evidence was only that some employee or employees in the layout department designed the stowage in this case. This is not sufficient to defeat the Carrier's defense under the Fire Statute. See *Consumers Import*, 320 U.S. at 250, 252, 64 S.Ct. at 16, 17. *Earle & Stoddard*, 287 U.S. at 425, 53 S.Ct. at 200 ("managing officers or agents;" chief engineer not included); *Hartford Accident & Indemnity Co. v. Gulf Refining Co.*, 230 F.2d 346, 355 (5th Cir. 1956), *cert. denied*, 352 U.S. 832, 77 S.Ct. 49, 1 L.Ed.2d 52 (1956) ("unseaworthiness in itself does not constitute such neglect, and . . . the negligence must be that of the owner

(Footnote continued from preceding page)

of cargo above a manhole might create an unnecessary hazard of instability in the cargo. Cargo argues that this testimony shows that the covering of manholes with cargo was so widespread as to be known by all, including the Lykes managers. The District Court did not make any finding that the Lykes management knew that access to cargo requiring inspection during the voyage was routinely being blocked on Lykes ships. To the contrary, the District Court found that the particular stowage decision in this case was made in the cargo layout department, and thus the particular decision was "attributable" to management. Indeed, the Master's testimony was so general as to state only the equivalent of what is in the Coast Guard regulations: that access is required for certain types of cargo, but not for others. See 46 C.F.R. § 146.02-12(a) (1975). There is absolutely no evidence that Lykes management knew or should have known of a general practice among its subordinates of blocking access to stows of *cotton*, or to any other cargos to which open access is required.

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himself or his managing officers"); *Complaint of Caldas*, 350 F.Supp. 566, 573 (E.D.Pa. 1972), *aff'd* 485 F.2d 680 (3d Cir. 1973) ("only if the negligence can be personally attributed to the owner or to *agents with broad responsibility* in the corporate organization . . ." (emphasis added)). Thus, the District Court erred in holding the Carrier liable for the ignition of the fire.

Causation: A Long Chain

Our reversal does not depend alone on the "design or neglect" analysis above. Even if it were assumed—as held by the District Court—that the stowage of sacks of flour blocking the manhole access to No. 3 LTD were somehow attributable to the management of Lykes,⁸ there is still no proof that the fire was *caused* by the design or neglect of the shipowner. The District Court's theory fails because of gaps in the evidence needed to support the long chain of supposed causation.

We start with the physical fact that the fire was not—in the ordinary operational sense—*caused* by the blocked manhole. A fire requires ignition. No ignition sprung from the manhole or from the sacks covering it. However, we are not so naive as to conclude that the mere physical and logical distance from the manhole above to the fire in the cotton bales below automatically exonerates the shipowner. We have to recognize, as did the Second Circuit,

⁸ In this section of the opinion we assume *arguendo* Cargo's theory that since the covering of manholes was a common practice, it was necessarily known to all and hence to the management level of Lykes, and, as the District Court found "that it was negligence on the part of the carrier in doing so."

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that there may be liability under the Fire Statute "where the shipowner's negligence did not cause ignition of the fire but where damage to the cargo could have been prevented . . . had it not been for the negligence of the shipowner." *Asbestos Corp. v. Compagnie De Navigation*, 480 F.2d 669, 672 (2d Cir. 1973).

Because there was no direct evidence available, the District Court reached its finding of how the fire started "through a combination of common sense, circumstantial evidence and expert testimony":

the fire started when the turnbuckle, on the chain securing the pipe stow, snapped, causing a spark, which ignited the cotton. In view of the fact that a clanking noise was heard in No. 3 lower tween deck about twelve hours prior to the first observation of smoke, the heavy seas that continued after the clanking noise was heard, and the flammable nature of the cotton stowed adjacent to the pipes, the Court finds no other reasonable explanation as to how the fire started.

At oral argument, counsel for Carrier stated that he could live with this finding on the physical cause of ignition, and we also assume the correctness of this explanation for the ignition. However, Carrier contends that there was no causal connection between the blocking of the manhole and the breaking of the turnbuckle. The District Court undertook to find this connection in this manner.

Had the accessways not been blocked, the fire would not have occurred, because the crew members who had checked the cargo in other holds where the manhole accessway was not blocked, would have had the opportunity to investigate the clanking noise

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heard the night of August 31st. Instead, there was no access to the No. 3 lower tween deck, and as a result, it was impossible to correct the situation. The Court finds, therefore, that the fire was caused by the "neglect or design" and "fault or privity" of Lykes.

The foregoing reasoning, based as it is on unproved assumptions that are not supported by the evidence, but only by speculation is flawed. This theory of causation adopted by the District Court assumes that (1) the chain was loose before the turnbuckle broke so that tightening of the turnbuckle would have prevented its breaking, (2) if the manhole had not been covered, a crewman could have and would have been able to descend into the No. 3 LTD during the voyage and find the turnbuckle in a position in which he could tighten it and (3) that the turnbuckle broke because the chain was too loose and put under excessive stress, and not because of some metallurgical deficiency unknown or unknowable to the shipowner.

The covering of the manhole is not a cause, because even if the access into No. 3 LTD had been open, there was no evidence that a crewman could have tightened the particular turnbuckle that broke. To the contrary, uncontroverted evidence showed that the turnbuckle before it broke had been tightly "sandwiched" or "imbedded" between the ends of two bales of cotton at the bottom of the stow. The report of Dr. Foster, who was employed by Cargo and who was the only expert who examined No. 3 LTD after the fire, stated that the turnbuckle had been "sandwiched" between two cotton bales. At oral argument, counsel for Cargo, in arguing the turnbuckle-spark theory of causation, described the turnbuckle as "imbedded" between the two bales, which logically supports the theory

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that a spark from the turnbuckle was still hot enough to cause ignition when it reached the cotton. With the turnbuckle in such a tight spot, there was absolutely no evidence that there was sufficient space in which a crewman could have inserted a lever into the turnbuckle and rotated it through an arc. Nor is there any evidence that with the turnbuckle imbedded as it was heavy chains such as those pictured in the photograph exhibits could be tightened by hand to a sufficient tension without a lever. Thus, access into No. 3 LTD could not have led to the retightening of the chain in question. "The defendant's conduct is not a cause of the event, if the event would have occurred without it." W. Prosser, *Law of Torts* § 41 (4th ed. 1971). *Accord, Farrell Lines, Inc. v. Jones*, 530 F.2d 7, 12 (5th Cir. 1976); *American Tobacco Co. v. The Katingo Hadji-patera*, 194 F.2d 449, 451 (2d Cir. 1951). *See Harrison v. Prather*, 435 F.2d 1168 (5th Cir. 1970). Under the turnbuckle-spark theory of ignition, the fire would have resulted even if the manhole had not been blocked. Thus, the stowing of flour over the manhole was neither a legal cause nor cause in fact of the fire.

In addition, there was no evidence that the chain was actually loose before the turnbuckle broke. If not, then the fire would have occurred even if there were access into No. 3, because the breaking of the turnbuckle could not have been prevented by tightening the buckle. The first and only indication that any chain was loose was the clanking noise heard by the crew at 23:25 hours on August 31. There is no evidence indicating whether the turnbuckle broke at that time and gave off the igniting spark at that time. The smoke detector was triggered 12 hours later, when the spark had built up to a combustion large enough to produce visible amounts of smoke rising out of the weather deck several decks

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above. As all expert testimony and the events in this case show, cotton can smolder in a quiescent state indefinitely without triggering even sensitive smoke detectors. If the turnbuckle broke when the clanking sound was first heard, then there is no evidence, circumstantial or otherwise, that the chain was ever loose before the turnbuckle broke. Because there was no evidence showing when during this 12 hour period the turnbuckle broke and the spark was produced, it is unknown whether the buckle broke from a metallurgic defect⁹ while the chain was tight, or whether the chain had been loose and clanking for 12 hours when the buckle broke and immediately caused detectable smoke. The failure of Cargo—who had the burden of proof on causation from design and neglect—to produce evidence that the chain was loose before any clanking cargo movement was heard, and the failure to produce evidence that the buckle did not break from a metallurgic defect when the chain was tight leaves a gap in the chain of causation that can be bridged only by speculation.

The theory that the turnbuckle broke because the pipes were moving within a chain that had become too loose is overcome by the fact that the stow of pipes did *not* break loose. Photographs and other evidence show that two of the three heavy chains and turnbuckles on the stow of narrow pipes held them in a bundle against the bulkhead despite extended heavy weather and a raging fire. The lashing was adequate to hold the stow with-

⁹ According to the report of Dr. Foster, a metallurgic test would reveal whether the break was due to a metallurgic defect. But no such metallurgic test was ever made or evidence offered. If there were a metallurgic defect, there was no evidence whatsoever that this was due to owner's design or neglect.

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out regard to the covering of the manhole. Because the bundle remained intact and the other two chains did not break, it is simply speculation that the turnbuckle on one chain, but not those on the other chains, broke from excessive force resulting from the pipes moving within a loose chain. Again, if the turnbuckle did not break because of the looseness of the chain, then access through the manhole would not have prevented the fire.

Generally, courts asked to accept expert speculation on the cause of a fire aboard ship based on sketchy circumstantial evidence have resisted the temptation. Instead, these courts held that the cause of the fire was simply not proved. Because the Fire Statute placed on the cargo a burden that was impossible to carry, there was no recovery. *Fidelity-Phenix Fire Ins. Co. v. Flota Mercante Del Estado*, 205 F.2d 886 (5th Cir. 1953); *Rooney v. Nuta*, 267 F.2d 142 (5th Cir. 1959) (clear error in speculative finding of cause of vessel fire in non-cargo limitation of liability proceeding); *American Tobacco Co. v. The Katingo Hadjipatera*, 194 F.2d 449, 451 (2d Cir. 1951) (reversing conjectural finding of cause of fire "based not on facts on which a witness testified orally, but only on secondary or derivative inference from the fact which the judge directly inferred from such testimony."); *Hoskyn & Co. v. Silver Line*, 143 F.2d 462 (2d Cir. 1944); *Automobile Ins. Co. v. United Fruit Co.*, 224 F.2d 72 (2d Cir. 1955); *Complaint of Caldas*, 350 F.Supp. 566 (E.D. Pa. 1972) *aff'd*, 485 F.2d 678 (3d Cir. 1973); *The Strathdon*, 101 F. 600 (2d Cir. 1900); *Connell Bros. Co. v. Sevensseas Trading & S.S. Co.*, 111 F.Supp. 227 (N.D. Cal. 1953), *rev'd on other grounds* 220 F.2d 511 (9th Cir. 1955); *Rockwood & Co. v. American President Lines, Ltd.*, 68 F.Supp. 224 (D.N.J. 1946);

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The Munaires, 12 F.Supp. 913 (E.D. La. 1935); *The President Wilson*, 5 F.Supp. 684 (C.D. Cal. 1933); *The Cabo Hatteras*, 5 F.Supp. 725 (S.D.N.Y. 1933); *The Brenta II*, 5 F.Supp. 682 (E.D.N.Y. 1933); *Petition of Sinclair Navigation Co.*, 27 F.2d 606 (S.D.N.Y. 1928). Because the tenuous connection between the covered manhole and the fire is so dependent on speculation and unproved facts, we join these many courts in holding that the asserted *cause* of the fire was not proved to have been from the owner's design or neglect.

The District Court also held that the stowage of cargo over the manhole was a cause of the cutting of the hole in the bulkhead between No. 3 and No. 4 through which to fight the fire. The District Court reasoned:

The negligent blocking of the access manhole was clearly a proximate cause of not only the fire, but the ensuing damage as well. The blocking of the accessway was the cause of the cutting of the access hold in the bulkhead.

The cutting of the access hole in the bulkhead obviously contributed to the salt water flooding of the No. 4 hold. The Court does not feel, however, that the blockage of the accessway was any less a cause of the damage to cargo in the No. 4 hold because of the natural consequence of events which followed the start of the fire.

The Court feels that the efforts to extinguish the fire, particularly the cutting of the access hold, were the natural consequences of Lyke's negligent blocking of the accessway.

Our holding that the covering of the manhole did not result from the design or neglect of the shipowner disposes of the District Court's holdings both as to the ship-

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owner's responsibility for the ignition of the fire, and as to responsibility for creating a need to cut a hole in the bulkhead separating No. 3 LTD and No. 4 in order to fight the fire.

The Firefighting Effort: Quenching the Claim

This brings us to the purported cross-appeal by Cargo from the District Court's finding that, whether or not the firefighting effort was negligent, it was not attributable to the shipowner, because the Master retained control of the decision-making in the foreign port. We describe this as "purported" since Cargo was the victor below. Cargo did not need an additional basis for a decree of liability against the Carrier. Cargo's prescience in foreseeing our reversal as to liability for the covering of the manhole has turned the purported into a reality. The cross-appeal was appropriate and we must address it. Having done so, we affirm.

A carrier may be liable for fire damage where the "design or neglect" of the owner prevented extinguishment of the fire once it had begun. *E.g. Complaint of Ta Chi Navigation (Panama) Corp.*, 677 F.2d 225, 228 (2d Cir. 1982). Carrier liability on this basis has generally been predicated on failure to provide adequate firefighting equipment and training, or a failure by management level employees to use a clear opportunity and available means to put out the fire. *See Asbestos Corp. v. Compagnie De Navigation*, 480 F.2d 669 (2d Cir. 1973); *American Mail Line, Ltd. v. Tokyo Marine & Fire Ins. Co.* 270 F.2d 499, 501 (9th Cir. 1959); *Fidelity-Phenix Fire Ins. Co. v. Flota Mercante Del Estado*, 205 F.2d 866, 889 (5th Cir. 1953); *Great Atlantic & Pacific Tea Co. v. Brasileiro*, 159 F.2d 661, 664 (2d Cir. 1947).

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In this case, there is no contention that the LESLIE did not have a complete, properly working system of firefighting equipment or that it was not used. Cargo challenged the specific tactics used to extinguish the fire after the vessel was moored in a foreign port. The District Court found that the Master, although listening to advice from Spanish port authorities, the Spanish naval firefighting school officials and shore-based Lykes employees, retained and exercised actual ultimate control over the firefighting effort on his ship. The tactical decisions of the Master, the Court held, were not attributable to the owner. Thus, the District Court did not reach the issue of whether the elaborate firefighting effort was englight.¹⁰

Cargo argues that the District Court erred, because the Carrier was under a duty to either *take* control to the extent possible or else be responsible for any negligent decision made by the Master.

A master is empowered to exercise his good faith judgment until he is relieved of his command, especially

¹⁰ The District Court explained:

The Court does not feel that suggestions made by Mr. Bernstein nor active assistance on the part of Mr. Castro constitute control such as to attribute the firefighting endeavors to Lykes' management. The Court finds, therefore, that the actions taken in an effort to extinguish the fire were taken pursuant to the orders of Captain Metcalf.

Hence, the Court does not reach the contention of cargo that the carrier was negligent in actually fighting the fire because the Court had concluded that Captain Metcalf made the decisions relating to the method of fighting the fire, which decisions are not attributable to the carrier. *Great Atlantic and Pacific Tea Co. v. Brasileiro*, 159 F.2d 661 (2d Cir. (1947)).

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where the safety of his crew, vessel, and cargo are concerned. See *United Geophysical Co. v. Vela*, 231 F.2d 816, 819 (5th Cir. 1956). We point out that a master is answerable not only to the shipowner for his job, but is also answerable to the Coast Guard, who giveth and taketh away pilot licenses.

One thing heavily stressed in Cargo's attacking the manner of the firefighting as negligent is the Master's decision to cut the hole in the No. 4 bulkhead. Cargo contended at trial that the Master was negligent in not uncovering the manhole cover to No. 3 LTD once the vessel was in port and fighting the fire through the manhole. For three reasons the Master chose to cut the hole in the No. 4 bulkhead, rather than attack the fire from above. First, pertinent firefighting literature admitted into evidence advised fighting a cargo fire from its own level, rather than from above. Second, the Master considered it too dangerous to send a man down the manhole ladder into the smoldering LTD. Third, the Master believed that the necessary oxygen breathing apparatus would not fit through the narrow manhole. The Master's decision was made in light of these factors. The decision did not relate to whether the manhole was open or covered. If the Master's decision were negligent, such negligence would not be attributable to the owner under the Fire Statute nor under the District Court's finding, which we affirm.

The owner is not liable for a master's negligence in fighting fires, unless the supervision exercised by the owner is also negligent, *E.g.*, *Great Atlantic & Pacific Tea Co. v. Brasileiro*, 159 F.2d 661, 164 (2d Cir. 1947). Cf. *Craig v. Continental Insurance Co.*, 141 U.S. 638, 639, 12 S. Ct. 97, 98, 35 L. Ed. 886 (1891) (acts of owner's envoy, who took command of vessel, were not

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within "privity or knowledge" of owner). Thus, in the case, where the Master retained decision-making authority, and was operating in a foreign port and needing to accomodate the concerns of foreign port officials and yet act expeditiously, the question of the owner's liability for the firefighting effort narrows to whether the owner was negligent in not insisting that the Master take a different course of action and relieving him of his command if he refused. The District Court's finding that the Master's actions were not attributable to the owner states in different words that management level employees did not know of any obviously unwise course of action taken by the Master that would require the owner to rigidly overrule the Master's "good faith latitude in professional judgment" by relieving him of his command. *Vela*, 231 F.2d at 819. The evidence was to the contrary. The Master safely brought the vessel with the cargo fire through heavy weather in the North Atlantic and into a safe harbor. The crew was saved, as was the vessel, and most of the cargo. After the fire, the voyage was completed. Thus, we find no error in the District Court's findings that, even if some aspect of the firefighting were negligent, such negligence would not be attributable to the owner.

In summary, we hold that the Carrier is exonerated from liability for the fire and water damage in this case by the Fire Statute. The interlocutory judgment is reversed, the cross-appeal is affirmed, and the case remanded for further proceedings.

REVERSED IN PART, AFFIRMED IN PART.

APPENDIX B

**Judgment of the United States Court of Appeals for the
Fifth Circuit**

(Filed—June 14, 1984)

**UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

NO. 82-3128

D. C. Docket No. CA-78-978-J

WESTINGHOUSE ELECTRIC CORPORATION,
ET AL.,

Plaintiffs-Appellees
Cross-Appellants,

Versus

M/V "LESLIE LYKES", ETC.,

Defendant,

LYKES BROS. STEAMSHIP CO., INC.,

Defendant-Appellant
Cross-Appellee

Appendix B

Appeal from the United States District Court for the
Eastern District of Louisiana

Before: BROWN, WISDOM and JOHSON, Circuit
Judges.

JUDGMENT

This cause came on to be heard on the record on appeal
and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here
ordered and adjudged by this Court that the judgment of
the said District Court in this cause be, and the same
is hereby, reversed in part, affirmed in part and that this
cause be, and the same is hereby, remanded to the said
District Court for further proceedings in accordance with
the opinion of this Court.

IT IS FURTHER ORDERED that plaintiffs-appellees
pay to defendant-appellant, the costs on appeal to be
taxed by the Clerk of this Court.

June 14, 1984

ISSUED AS MANDATE: July 23, 1984

APPENDIX C

**Order Denying Petitions for Rehearing of the United States
Court of Appeals for the Fifth Circuit**

(Filed—July 13, 1984)

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 82-3128

**WESTINGHOUSE ELECTRIC CORPORATION,
ET AL.,**

**Plaintiffs-Appellees
Cross-Appellants,**

Versus

M/V "LESLIE LYKES", ETC.,

Defendant

LYKES BROS. STEAMSHIP CO., INC.,

**Defendant-Appellant
Cross-Appellee**

**Appeal from the United States District Court of the
Eastern District of Louisiana**

Appendix C

ON PETITION FOR REHEARING AND SUGGESTION
FOR REHEARING EN BANC

(Opinion June 14, 1984, 5 Cir., 198-, — F.2d—)

(July 13, 1984)

Before BROWN, WISDOM and JOHNSON, Circuit
Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

JOHN MINOR WISDOM
United States Circuit Judge

July 11, 1984

CLERK'S NOTE:

SEE FRAP AND LOCAL
RULES 41 FOR STAY OF THE
MANDATE.

APPENDIX D

**Conclusions of Law and Findings of Fact of the United
States District Court for the Eastern District of Louisiana**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION

NO. 78-978

SECTION "J"

WESTINGHOUSE ELECTRIC CORPORATION,
ET AL.,

Versus

S/S LESLIE LYKES, ETC., *IN REM*, AND LYKES
BROTHERS STEAMSHIP COMPANY, INC.

Plaintiffs are cargo interests who seek to recover for cargo damaged as a result of a fire which broke out aboard the S/S LESLIE LYKES on September 1, 1976, while the vessel was en route from the United States to European ports. Lykes Brothers Steamship Company, Inc. (hereinafter "Lykes") was the owner of the LESLIE LYKES at the time of the incident.

Lykes filed a counterclaim against plaintiffs for contributions in General Average.

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Plaintiffs claim that Lykes was responsible for the damages incurred as a result of this incident and seek full recovery for the loss of the cargo, irrespective of the issue of contributions owing under the General Average. The Court bifurcated the trial and proceeded only on the question of whether or not Lykes is exonerated from liability under the Carriage of Goods by Sea Act, 46 U.S.C. § 1301, or the Fire Statute, 46 U.S.C. § 182.

FINDINGS OF FACT

The LESLIE LYKES was an ocean going steamship used for the purpose of transporting break-bulk or general cargo. For the purposes of this lawsuit, the layout of a portion of the ship is pertinent.

The LESLIE LYKES, after an elongation in 1972, is 592 feet in length and 62 feet in beam. The 1972 elongation consisted of the insertion of a container cell as the No. 4 hold. The other holds of the ship, Nos. 1, 2, 3, 5 and 6, are general cargo holds.

The No. 3 hold is divided into three horizontal compartments. The bottom compartment is the lower hold, which is used for the stowage of dry cargo. It is also referred to as the dry cargo hold. The middle compartment is the lower tween deck and the top compartment, the upper tween deck. Each deck has a MacGregor hatch cover, which opens in an accordian fashion, consisting of panels attached by hinges, positioned on rollers. The hatch cover is activated hydraulically.

Set up in the same way as the No. 3 hold is the No. 2 hold, which is forward of and adjacent to the No. 3 hold. Located in both holds No. 3 and No. 2 were ladders run-

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ning through the depth of the ship. At each level or compartment was a manhole for entry into the next deck via the ladder. These accessways allowed the crew to make periodic checks to confirm the security of the cargo. The accessway manhole on the No. 3 hold was at the forward bulkhead between the No. 3 and No. 2 holds. The accessway in the No. 2 was aft, also at the bulkhead between No. 3 and No. 2 holds. The entrance to the No. 3 manhole is at the top of the motor/generator house located on the weatherdeck.

The No. 4 hold was situated immediately adjacent to and aft the No. 3 hold. Unlike holds No. 2 and No. 3, hold No. 4 was divided into three vertical compartments so that container cells could be stored within the hold. The vertical divisions ran fore and aft. The accessway in No. 4 was located at the forward bulkhead, between the No. 4 and No. 3 holds.

On the voyage in question, Lykes Voyage 64, two Westinghouse rotors were being shipped in separate containers in the No. 4 hold. One was being transported in the container port side and the other in the container starboard side. In the middle container were pipes. In addition to this cargo, bags of flour were shipped in open spaces in the No. 4 hold.

The No. 3 upper tween deck contained two heavy lifts over the hatch cover to the No. 3 lower tween deck and bags of flour all over, i.e., from bulkhead to bulkhead and from side to side. Bags of flour were stowed over the manhole entry into the No. 3 lower tween deck, thus making passage into the No. 3 lower tween deck impossible via the accessway.

Among the cargo stowed in the No. 3 lower tween deck were bales of cotton. Cotton is flammable and generally

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considered as potentially hazardous cargo. Immediately aft the cotton bales between the cotton and the bulkhead between No. 3 hold and No. 4 hold, was a stow of drill pipe. The pipe stow was secured by chains which were tightened by a turnbuckle.

The LESLIE LYKES sailed from her last port of call in the U. S., Charleston, South Carolina, on the evening of August 27, 1976. On August 29th, the vessel encountered rough weather, the seas rolling heavily due to the fact that the vessel was sailing on the edge of a hurricane. Though the weather was rough, it was not unusual or unexpected.

At 2315 hours on August 31, 1976, a clanking noise was heard by members of the crew, thought at the time to have been coming from the No. 4 hold. At the time the noise was heard, the vessel was still sailing in rough seas.

The crew checked the cargo every couple of days in order to confirm that the stow was tight and secure. The boatswain had been down in the No. 4 hold, by opening the manhole on the weatherdeck and descending the ladder provided for that purpose, on the voyage in question.

Although an accessway was provided in the No. 3 hold, access could not be obtained into the No. 3 lower tween deck due to the bags of flour which had been stowed over the manhole cover, in the No. 3 upper tween deck. Hence, it was not possible to take any steps to check or secure the cargo once the clanking noise was heard.

At 1212 hours on the following day, September 1, 1976, smoke was observed from the bridge by Captain Metcalf, master of the vessel, coming from the kingpost

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forward of the No. 3 hold. The smoke detector system indicated that a fire was in the No. 3 lower tween deck.

A thermometer was placed in the No. 4 hold at the hottest spot on the bulkhead between No. 4 and No. 3, in order to monitor the temperature and status of the fire.

The thermometer which was placed at the starboard side of the forward bulkhead of the No. 4 hold originally indicated a temperature of 130 degrees. The bulkhead temperatures indicated that the fire was in the vicinity of the starboard aft section of the No. 3 lower tween deck, where the cotton and drill pipes had been stowed.

The weatherdeck hatch of the No. 3 hold was then sealed with tape so that the leakage of CO₂ would be alleviated as much as possible. Also, the blowers of the vessel's ventilator system were shut off so as not to afford the fire any ventilation. The vessel was equipped with a CO₂ injection system in each hold.

Captain Metcalf ordered the release of 24 bottles of CO₂ into the No. 3 lower tween deck, through the CO₂ system of the ship, in accordance with the directions provided by the manufacturer of the CO₂ system. Pursuant to those instructions, the crew continued to introduce CO₂ into the No. 3 lower tween deck up until the time that the vessel arrived at El Ferrol, Spain, at which time the thermometer which had been placed on the bulkhead indicated the temperature had dropped to 110 degrees.

Soon after the introduction of CO₂, the smoke abated, as indicated by the smoke detector. No visual indication of smoke from the kingpost ventilator nor on the

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smoke detector system was found after September 1st, until the opening of the No. 3 weatherdeck hatch at El Ferrol.

The vessel left Charleston with 72 full cannisters of CO₂. By the time it reached El Ferrol, 2 cannisters remained full. Due to the concern that the supply of CO₂ might run low, in addition to the insertion of CO₂ into the No. 3 lower tween deck, steam was introduced into the compartment. This was accomplished by drilling five 1/2- to 3/4-inch holes into the bulkhead of the No. 4 hold just above the location of the stow of drilling pipes located on the No. 3 lower tween deck. Steam lances were inserted into the holes.

Captain Metcalf discussed the events taking place with Lykes' managing personnel at New Orleans by radio-telephone each day, from the time fire was first detected. He followed some suggestions for fighting the fire made by Lykes' vice-president in charge of maintenance and repair, Joseph Bernstein.

Mr. Lucian Castro, then supervisor of port engineers at Lykes, was sent by Lykes to meet the vessel at El Ferrol for the purpose of rendering any assistance that he could. It was the policy of the company to send a company representative any time a vessel was in trouble. Mr. Castro was sent because he was considered to be knowledgeable and experienced in cotton fires.

Mr. Castro prepared himself for the journey by reviewing the stowage plan for the voyage in question, the vessel's CO₂ system, and bringing available foam and other chemicals for extinguishing cotton fires.

When the vessel arrived at El Ferrol on September 6th at about 1818 hours, Mr. Castro was there to meet it.

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Upon arrival, an informal meeting was held to discuss what course of action would be taken. Several parties had boarded the vessel by that time, and the meeting included members of the Spanish Navy and firefighters, port authorities, Captain Metcalf, Mr. Castro and Fred Hulsey, the ship's chief engineer.

A decision was made by Captain Metcalf, at the conclusion of the meeting, that an access hole would be cut in the bulkhead between the No. 3 and No. 4 holds, at the point of highest temperature. The purposes for cutting the access hole were to see into the No. 3 lower deck to inspect the status of the fire and, if necessary, to fight the fire from its own level through the access hole.

The access hole was cut in the same location of the bulkhead where the steam lance holes had been drilled, which was beneath an athwartship walkway which ran along the forward bulkhead in the No. 4 hold. In order to cut the hole, which was accomplished by drilling several contiguous holes, bags of flour stored in the No. 4 hold were moved to provide sufficient work space.

A cover was made for the access hole in an attempt to keep the compartment as air tight as possible. The access hole was approximately 18 by 24 inches.

Subsequent to the completion of the cutting of the access hole on September 7th, Mr. Castro and John Ebanks, the boatswain, attempted entry through the access hole in order to assess the status of the fire. Hoses were run from the vessel's compressed air supply, through a makeshift filter consisting of paper and a miner's type mask, in order to afford them adequate air supply.

Mr. Ebanks successfully entered the No. 3 lower tween deck and Mr. Castro partially entered. Upon entry into

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the hold, Mr. Ebanks stood on top of the drill pipe stow in order to look around. He then sprayed water over the cargo in the compartment to see if smoke would rise, which would establish the existence or non-existence of a fire. No signs of smoke were visible to either party.

Due to extreme heat, Mr. Castro had the ventilator system's fan turned on. As a result, the No. 3 lower tween deck compartment became pressurized and CO₂ was forced out of the compartment into the No. 4 hold. Members of the crew standing by in the No. 4 hold were overcome as a result of not having masks on. Additionally, Mr. Castro, whose mask became dislodged when he turned to leave the area, passed out when he was overcome by the gas and was taken to the hospital. Mr. Ebanks was also overcome due to the fact that the hose to his mask did not reach as far as he had ventured at the time the compartment became pressurized.

Shortly after evacuation from the No. 4 hold, foam was introduced into the No. 3 lower tween deck compartment via the access hole. The use of foam was designed to accomplish the same thing as CO₂, namely, to keep oxygen from the fire. This was done by the Navy Fire Control Unit about 3½ hours after the entry into the compartment by the boatswain.

On the following morning, September 8th, at 0905 hours, the weatherdeck hatchcover of the No. 3 hold, leading into the No. 3 upper tween deck, was opened. When the hatch cover was first opened, little smoke was seen.

The Spanish firefighters, there to assist in fighting the fire, entered the upper tween deck and removed two pieces of heavy lift equipment, so that the hatch cover

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over the lower tween deck could be opened, as the heavy lifts prevented entry because they were stored over the hatch cover.

As attempts to open the hatch cover over the No. 3 lower tween deck commenced, smoke was seen emanating from the compartment below, from the cracks between the sections of the hatch cover. Before the hatch cover could be completely opened, a "whoosh" was heard and flame erupted from the hold, followed by a dull explosion. Firefighters immediately began flooding the No. 3 hold with hoses from the top and from the bottom through the use of bilge pumps.

At about the same time that the flooding of the No. 3 hold commenced, smoke was detected in both the No. 4 and No. 2 holds. Fires had been caused there by the conduction of heat through the No. 3 bulkheads. By that time, the fire in the No. 3 hold had spread throughout most of the compartment. Stored near the bulkheads in each hold were bags of flour.

Fire hoses were placed in the access manhole of the No. 4 hold and tied to secure a direct stream toward the forward bulkhead, where it was believed the fire was coming from. Hoses were also used to fight the fire in the No. 2 hold.

Both the No. 3 and No. 4 holds were filled with salt water, inundating the Westinghouse rotors.

Following the extinguishment of the fire and the emptying of water from the holds, the turnbuckle which was securing a chain surrounding the pipe stow in the No. 3 lower tween deck was found to have been broken.

To the extent that these Findings of Fact constitute Conclusions of Law, they are specifically adopted as both Findings of Fact and Conclusions of Law.

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CONCLUSIONS OF LAW

The Court has admiralty jurisdiction over this matter based on 28 U.S.C. § 1333 and Rule 9(h) of the Federal Rules of Civil Procedure.

The rights and liabilities of the parties before the Court are governed by the Carriage of Goods by Sea Act, 46 U.S.C. § 1301 et. seq. (hereinafter "C.O.G.S.A."), and 46 U.S.C. § 182 (hereinafter "the Fire Statute").

Section 1304(2)(b) of C.O.G.S.A. provides:

(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

(b) Fire, unless caused by the *actual fault or privity* of the carrier. (Emphasis added)

The Fire Statute provides:

No owner of any vessel shall be liable to answer to any person any loss or damage, which may happen to any merchandise, whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the *design or neglect of such owner*. (Emphasis added)

Once cargo establishes that a bill of lading was issued by the carrier and that the carrier failed to deliver the goods in sound condition, cargo has made a *prima facie* case. *Socony Mobil Oil Co., Inc. v. Tex. Coastal & International, Inc.*, 559 F.2d 1008 (5th Cir. 1977). 46 U.S.C. § 1303(4). Cargo has done so in this case. It delivered

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the rotors to Lykes in apparent good condition, received a clean bill of lading thereupon and the goods were damaged upon discharge.

It is the position of cargo that once it establishes its prima facie case, it then becomes the burden of the carrier to establish that it exercised due diligence in accordance with Section 1303, before it can assert the fire exemptions as a defense,¹ under the Ninth Circuit's decision in *Sunkist Growers, Inc. v. Adelaide Shipping Lines*, 603 F.2d 1327 (9th Cir. 1979).

The burden which the carrier must meet under this interpretation is that it exercised due diligence in providing a seaworthy ship or that any unseaworthiness was not attributable to lack of due diligence. *Sunkist Growers, Inc., supra*.

Under the Ninth Circuit's interpretation, if the carrier fails to establish that it acted in accordance with 46 U.S.C. § 1303, or that failure to do so did not cause the fire and resulting damage, the carrier is barred from asserting the fire exemptions as a defense. *Sunkist Growers, Inc., supra*. If the carrier does meet that burden, then the burden shifts to cargo to prove that the fire was caused by the "design or neglect" or the "fault or privity" of the carrier.

¹ Section 1303 of C.O.G.S.A. provides in pertinent portion:

(1) The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—

(a) Make the ship seaworthy;

(b) Properly man, equip and supply the ship;

(c) Make the holds, refrigerating and cooling chambers and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage, and preservation.

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In *Earle & Stoddart, Inc., et al v. Ellerman's Wilson Line, Ltd.*, 287 U. S. 420 (1932), the same proposition made by cargo here, and accepted by the Ninth Circuit in *Sunkist*, was rejected by the Supreme Court, namely, that failure to exercise due diligence which results in unseaworthiness existing at commencement of the voyage precludes protection under the Fire Statute. The Fifth Circuit, citing *Earle & Stoddart, Inc.*, has stated:

It is well settled that a shipowner is not liable for damages resulting from fire unless libellant proves that the cause of the fire was due to the "design or neglect" of the owner, the burden being upon libellant.

Fidelity-Phenix Fire Ins. Co. v. Flota Mercante Del Estado, 205 F.2d 886 (5th Cir. 1953). Although the Supreme Court was dealing only with the Fire Statute in *Earle & Stoddart, Inc., supra*, the Fifth Circuit considered both statutes in *Fidelity-Phenix Fire Ins. Co., supra*.

On the one hand, under the Ninth Circuit's view, the carrier must prove that it was free of any negligence under Section 1303 which caused the fire, before the burden shifts to cargo. On the other hand, under the rule of *Earle & Stoddart, Inc., supra*, cargo must prove that the fire was caused by the carrier's "neglect or design" or "fault or privity", without the carrier having to prove that it exercised due diligence.

As with any fire, the actual ignition of which is unwitnessed, the Court may only determine how the fire started in the No. 3 lower tween deck of the LESLIE LYKES "through a combination of common sense, circumstantial evidence and expert testimony." *Minerals and*

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Chemicals Philipp Corporation v. S/S NATIONAL TRADER, 445 F.2d 831 (2nd Cir. 1971). In the absence of direct proof, causation can be ascertained through the facts and circumstances surrounding the incident, viewed in light of common experience. *United States v. Standard Oil Company of California*, 495 F.2d 911 (9th Cir. 1974). See also: *Ionmar Compania, Etc. v. Central of Ga. R. Co.*, 471 F. Supp. 942 (S. D. Ga. 1979).

The facts adduced at trial and the opinion of Frank Rushbrook, an expert in vessel firefighting, established that the fire started when the turnbuckle, on the chain securing the pipe stow, snapped, causing a spark, which ignited the cotton. In view of the fact that a clanking noise was heard in the No. 3 lower tween deck about twelve hours prior to the first observation of smoke, the heavy seas that continued after the clanking noise was heard, and the flammable nature of the cotton stowed adjacent to the pipes, the Court finds no other reasonable explanation as to how the fire started.

The reason that accessways existed in the holds of the LESLIE LYKES was so that the crew could make periodic checks in order to maintain the stow in a safe manner, to prevent damage.

The uncontroverted testimony established that the cargo layout section in Lykes' head office in New Orleans was responsible for confecting the stowage plan for Lykes voyages. The vessel was loaded pursuant to that plan. The stowage plan for Voyage 64 indicates that bags of flour were to be stowed "all over" in the No. 3 upper tween deck, blocking the manhole to the accessway ladder in the No. 3 lower tween deck. The Court finds that Lykes' management knew or should have known of this practice.

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It is the carrier's responsibility to make sure the vessel is properly loaded. 46 U.S.C. § 1303(2). The Court concludes that the stowage of the bags of flour over the manhole was attributable to the management level of Lykes. *Consumers Import Company v. Kabushiki Kaisha Kawasaki Zosenjo*, 64 S. Ct. 15 (1943).

Though the testimony established that it was common practice to block accessways, the Court does not find that such practice excuses the fact that it was negligence on the part of the carrier in doing so. Had the accessways not been blocked, the fire would not have occurred, because the crew members who had checked the cargo in other holds where the manhole accessway was not blocked, would have had the opportunity to investigate the clanking noise heard the night of August 31st. Instead, there was no access to the No. 3 lower tween deck, and as a result, it was impossible to correct the situation.² The Court finds, therefore, that the fire was caused by the "neglect or design" and "fault or privity" of Lykes.

Cargo has met its burden of establishing such responsibility and that this negligence caused the fire. Lykes is therefore precluded from exemption under the Fire Statute and C.O.G.S.A.

The Court also concludes that Lykes failed to exercise due diligence in providing a seaworthy vessel in

² See, e.g., *Master Shipping Agency, Inc. v. M.S. Farida*, 571 F.2d 131 (2d Cir. 1978). In that case, the Second Circuit affirmed the district court's finding that the stevedore who loaded the vessel was negligent in stowing cargo in front of an entranceway, preventing entry into the hold, because remedial action could have been taken had access been available.

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its stowing bags of flour over the manhole accessway to the No. 3 lower tween deck. The manhole was not fit for its intended use, and as a result, rendered the LESLIE LYKES unseaworthy. This unseaworthy condition was a proximate cause of the fire and resulting damage to cargo. Thus, under the holding of *Sunkist Growers, Inc.*, Lykes would be barred from asserting the fire defense. The conflict between the two interpretations is moot, as indicated earlier, because cargo has carried its burden imposed by both statutory exemptions.

Cargo attempted to establish at trial that management personnel, specifically Mr. Bernstein and Mr. Castro, were responsible for the procedures followed in attempting to extinguish the fire, and that any negligence in the firefighting must be attributed to Lykes. Most significantly, cargo argues that Mr. Castro and Mr. Bernstein, either through advice, or through their explicit or tacit approval, participated in the firefighting endeavors to such an extent as constitute "neglect or design" and "fault or privity" of Lykes for damages resulting from the series of events which followed ignition of the fire.

In order for the Court to find that the actions taken in attempts to extinguish the fire were attributable to Lykes, the Court must find that Mr. Castro, Mr. Bernstein, or some other member of Lykes' personnel at a management level was responsible. *Consumers Import Co., supra*.

The Court does not feel that suggestions made by Mr. Bernstein nor active assistance on the part of Mr. Castro constitute control such as to attribute the firefighting endeavors to Lykes' management. The Court finds, there-

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fore, that the actions taken in an effort to extinguish the fire were taken pursuant to the orders of Captain Metcalf.

Hence, the Court does not reach the contention of cargo that the carrier was negligent in actually fighting the fire because the Court has concluded that Captain Metcalf made the decisions relating to the method of fighting the fire, which decisions are not attributable to the carrier. *Great Atlantic and Pacific Tea Co. v. Brasileiro*, 159 F.2d 661 (2nd Cir. 1947).

In an admiralty context, the Fifth Circuit, in *Olympic Towing Corporation v. Nebel Towing Company*, 419 F.2d 230 (5th Cir. 1969), defined proximate cause as "that cause which in a direct, unbroken sequence produces the injury complained of and without which such injury would not have happened."

The negligent blocking of the access manhole was clearly a proximate cause of not only the fire, but the ensuing damage as well. The blocking of the accessway was the cause of the cutting of the access hole in the bulkhead.

The cutting of the access hole in the bulkhead obviously contributed to the salt water flooding of the No. 4 hold. The Court does not feel, however, that the blocking of the accessway was any less a cause of the damage to cargo in the No. 4 hold because of the natural consequence of events which followed the start of the fire.³

³ Section 447 of the Second Retatement of Torts provides:

The fact that an intervening act of a third person is negligent in itself or is done in a negligent manner does not

(Footnote continued on following page)

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The Court feels that the efforts to extinguish the fire, particularly the cutting of the access hole, were the natural consequences of Lykes' negligent blocking of the accessway. Lykes, upon planning to stow bags of flour blocking the accessway, should have known that access would be necessary in the event of a fire in the inaccessible compartment. Though certainly a contributing cause of the damage, the Court does not find the firefighting efforts in this case to preclude recovery from the initial wrongdoer, the carrier.

Because the Court finds that Lykes' negligence was a proximate cause of the fire and resulting damage to cargo complained of herein, Lykes is precluded from exoneration from liability otherwise available under C.O.G.S.A. and the Fire Statute, and is liable to plaintiffs for the damage incurred as a result of the fire aboard the **LESLIE LYKES**.

Having failed to establish what proportion of the damage was not caused by its negligence, Lykes must bear the entire loss. *Schnell v. The VALLESCURA*, 55 S. Ct. 194

(Footnote continued from preceding page)

make it a superceding cause of harm to another which the actor's negligent conduct is a substantial factor in bringing about, if

(a) the actor at the time of his negligent conduct should have realized that a third person might so act, or

(b) a reasonable man knowing the situation existing when the act of a third person was done was not regarded as highly extraordinary that the third person had so acted, or

(c) the intervening act is a normal consequence of a situation created by the actor's conduct and manner in which it is done is not extraordinarily negligent.

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(1934). "In such a case the carrier must bear all the damages even though it has been established that those damages were in part caused by occurrences for which it is excepted from liability." *Vana Trading Co., Inc. v. S.S. METTE SKOU*, 556 F.2d 100 (2nd Cir. 1977).

To the extent that these Conclusions of Law constitute Findings of Fact, they are specifically adopted as both Conclusions of Law and Findings of Fact.

New Orleans, Louisiana, this the 8th day of February, 1982.

PATRICK E. CARR
United States District Judge

APPENDIX E

**Judgment of the United States District Court for the
Eastern District of Louisiana**

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION

NO. 78-978

SECTION "J"

**WESTINGHOUSE ELECTRIC CORPORATION,
ET AL.,**

Versus

**S/S LESLIE LYKES, ETC., *IN REM*, AND LYKES
BROTHERS STEAMSHIP COMPANY, INC.**

JUDGMENT

In accordance with the Findings of Fact and Conclusions of Law issued by the Court and attached hereto,

It Is ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of plaintiffs, Westinghouse Electric Corporation, Witco Chemical Corporation, Italsem-

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pione, S.p.A., Manifattura Rotondi, Astron Forwarding Company, Lubrizol International, S.A., Comercial Algodonera Juan Mata, S.A., Morrison Knudsen International Company, Inc., L'Enterprise Nationale Pour La Recherche, La Production, Le Transport, La Transformation Et La Comercialisation Des Hydrocarbures, and against defendant, Lykes Brothers Steamship Company, on the issue of liability only, defendant, Lykes Brothers Steamship Company, being precluded from exoneration under either 46 U.S.C. § 182 or 46 U.S.C. § 1304(2)(b), and liable to plaintiffs for cargo damage in accordance therewith, reserving all issues of quantum and general average to be determined at a later date.

New Orleans, Louisiana, this the 8th day of February, 1982.

PATRICK E. CARR
United States District Judge

APPENDIX F**Relevant Statutes**

U.S.C.A. Title 46: Shipping**"LIMITATION OF SHIPOWNERS' LIABILITY ACT"****§ 182. Loss by fire [The "Fire Statute"]**

No owner of any vessel shall be liable to answer for or make good to any person any loss or damage, which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner.

§ 183. Amount of liability; loss of life or bodily injury; privity imputed to owner; "seagoing vessel"

(a) The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value or the interest of such owner in such vessel, and her freight then pending.

(b) In the case of any seagoing vessel, if the amount of the owner's liability as limited under subsection (a)

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of this section is insufficient to pay all losses in full, and the portion of such amount applicable to the payment of losses in respect of loss of life or bodily injury is less than \$60 per ton of such vessel's tonnage, such portion shall be increased to an amount equal to \$60 per ton, to be available only for the payment of losses in respect to loss of life or bodily injury. If such portion so increased is insufficient to pay such losses in full, they shall be paid therefrom in proportion to their respective amounts.

(c) For the purposes of this section the tonnage of a seagoing steam or motor vessel shall be her gross tonnage without deduction on account of engine room, and the tonnage of a seagoing sailing vessel shall be her registered tonnage: *Provided*, That there shall not be included in such tonnage any space occupied by seamen or apprentices and appropriated to their use.

(d) The owner of any such seagoing vessel shall be liable in respect to loss of life or bodily injury arising on distinct occasions to the same extent as if no other loss of life or bodily injury had arisen.

(e) In respect of loss of life or bodily injury the privity or knowledge of the master of a seagoing vessel or of the superintendent or managing agent of the owner thereof, at or prior to the commencement of each voyage, shall be deemed conclusively the privity or knowledge of the owner of such vessel.

(f) As used in subsection (b), (c), (d), and (e) of this section and in section 183(b) of this title, the term "seagoing vessel" shall not include pleasure yachts, tugs, towboats, towing vessels, tank vessels, fishing vessels or their tenders, self-propelled lighters, nondescript self-pro-

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pelled vessels, canal boats, scows, car floats, barges, lighters, or nodescript non-self-propelled vessels even though the same may be seagoing vessels within the meaning of such term as used in section 188 of this title.

“U.S. CARRIAGE OF GOODS BY SEA ACT”

RESPONSIBILITIES AND LIABILITIES

§ 1303 (1) The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—

(a) Make the ship seaworthy;

(b) Properly man, equip, and supply the ship;

(c) Make the holds, refrigerating and cooling chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage, and preservation.

(2) The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

• • •

RIGHTS AND IMMUNITIES OF CARRIER AND SHIP

UNSEAWORTHINESS

§ 1304 • • •

(1) Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy,

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and to secure that the ship is properly manned, equipped, and supplied, and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage, and preservation in accordance with the provisions of paragraph (1) of section 1303 of this title. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section.

UNCONTROLLABLE CAUSES OF LOSS

(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

• • •

(b) Fire, unless caused by the actual fault or privity of the carrier.

• • •

2
NO. 84-608

Office - Supreme Court, U.S.

FILED

NOV 7 1984

ALEXANDER L. STEVAS,

CLERK

**In the
Supreme Court of the United States**

OCTOBER TERM, 1984

WESTINGHOUSE ELECTRIC CORPORATION, et al.,

Petitioners

versus

**S/S LESLIE LYKES, her engines, etc., *in rem*, and
LYKES BROS. STEAMSHIP CO., INC.,**

Respondents

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit**

**Opposition of Respondent Lykes Bros., Steamship
Co., Inc., to the Petition of Westinghouse Electric
Corporation, et al., for WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT**

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**Alfred M. Farrell, Jr.
Of Counsel**

COUNTER-STATEMENT OF QUESTIONS FOR REVIEW

I

In a suit to recover cargo loss or damage resulting from a fire aboard an ocean carrier, do not the statutes (the Fire Statute, 46 U.S.C. Sec. 182, and the Carriage of Goods by Sea Act, 1936, Secs. 1304(2)(b) and 1308), and the decisions of this Court, as well as the uniform decisions, with one questionable exception, of the lower courts, mandate that cargo prove that the loss or damage was caused by the "design or neglect" of the owner, and the "actual fault or privity" of the carrier?

II

Whether the Fire Statute, expressly preserved by the Carriage of Goods by Sea Act, 1936 (46 U.S.C. Sec. 1308), is in any way subject to Sec. 1304(1) of the Act, but rather is not entirely independent thereof, so that the condition precedent of due diligence does not apply to fire?

III

Whether the Fifth Circuit's careful analysis of the cause of the fire is not correct, and whether its conclusion that the cause of the fire was neither "design or neglect" or "actual fault or privity", should not be sustained.

IV

Will this Court disturb the concurrent findings of fact of the two lower courts that the procedures in the effort to extinguish the fire were those decided and executed

under the direction of the master of the vessel, on the scene, and not under the "supervision and approval" of the home office or the port engineer present aboard the vessel; and thus not within the "design or neglect" or "actual fault or privity" of the carrier?

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NO. 84-608

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

WESTINGHOUSE ELECTRIC CORPORATION, et al.,

Petitioners

versus

S/S LESLIE LYKES, her engines, etc., *in rem*, and
LYKES BROS. STEAMSHIP CO., INC.,

Respondents

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

Opposition of Respondent Lykes Bros., Steamship
Co., Inc., to the Petition of Westinghouse Electric
Corporation, et al., for WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT

STATUTORY PROVISIONS INVOLVED

FIRE STATUTE (46 U.S.C. §182):

No owner of any vessel shall be liable to answer
for or make good to any person any loss or
damage which may happen to any merchandise
whatsoever which shall be shipped, taken in, or
put on board any such vessel, by reason or by

means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner.

**UNITED STATES CARRIAGE OF GOODS BY SEA
ACT, 1936**

Rights and Immunities—Sec. 4

46 U.S.C. §1304

(1) Neither the carrier nor the ship shall be liable for damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, and to make the holds, refrigerating and cool chambers, and all other, parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph (1) of Section 3. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section.

(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—..

(b) Fire, unless caused by the actual fault or privity of the carrier.

Responsibilities and Liabilities—Sec. 3.

46 U.S.C. §1303

(1) The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—

- (a) Make the ship seaworthy;
- (b) Properly man, equip, and supply the ship;
- (c) Make the holds, refrigerating and cooling chambers, and all other parts of the ship in which goods are shipped, fit and safe for their reception, carriage and preservation.

46 U.S.C. §1308

Sec. 8. The provisions of this Act shall not affect the rights and obligations of the carrier under the provisions of the Shipping Act, 1916, 39 Stat. 728, 46 U.S. Code 801, or under the provisions of sections 4281 to 4289, inclusive, of the Revised Statutes of the United States; 46 U.S. Code 181-189, or of any amendments thereto; or under the provisions of any other enactment for the time being in force relating to the limitation of the liability of the owners of seagoing vessels.

(N.B., R.S. 4282, 46 U.S.C. 182, is the Fire Statute)

STATEMENT OF THE CASE

At the commencement of the voyage involved, the **LESLIE LYKES** was in all respects seaworthy in design, gear, hull, machinery, and equipment, currently certified by the Coast Guard and by the American Bureau of Shipping.

After calls at various gulf ports, she took departure from Charleston for her Atlantic crossing August 27, 1976. On August 29, 30, 31st, the vessel encountered heavy weather in the vicinity of Hurricane Emmy.

On August 31, at 2315, the mate on the bridge detected the noise of a possible cargo movement, and on the morning of September 1st, a clanking sound was heard in the No. 3 hold, not from No. 4 as had originally been thought. At 1212 the smoke detector alarm buzzer sounded on the bridge, confirming fire in No. 3 lower tween deck.

Fire fighting commenced at once and continued aboard the ship, and apparently succeeded, as she made her way to her destination, El Ferrol, Spain, arriving September 6, where she was boarded by port officials, officers of the Spanish navy fire fighting school, the local fire brigade, and Mr. Castro, Lykes' port engineer, who had come from New Orleans to meet her.

A rectangular hole was drilled into the No. 3 lower tween deck from No. 4 to probe the source of the fire, and was temporarily covered. September 8 to reach the No. 3 lower tween deck, the No. 3 weather deck was opened, and then the pontoon covers of the No. 3 lower tween deck were rolled back. A flash-over occurred; heat was conducted through the bulkheads, aft to No. 4 and forward to No. 2, igniting bagged flour in each. All three holds had to be flooded and the fire was finally extinguished. Cargo in the three holds was damaged, some by fire, some by water in the efforts to extinguish, some by both.

Because of their extraordinary valor, reflecting the highest proficiency of the Merchant Marine, both at sea and El Ferrol, the officers and the crew of the LESLIE LYKES were cited with commendations in a public ceremony.

Access to the No. 3 lower tween deck was blocked with the stowage of flour in No. 3 upper tween deck and it

is really on this one point that petitioner has sought to build its entire case. The argument that the blocked manhole was the proximate cause of the fire is a complete non sequitur, not supported by any effective evidence. So too, as the Fifth Circuit has made plain in its review of the crucial question of causation, 734 F.2d at 205, 212, *et seq.* the fire was not *caused* by the blocked manhole.

On this record it does not appear necessary to repeat here the efforts to probe the source of the fire and the efforts to make sure it was extinguished. The two courts below have held that these efforts were the actual decisions of the master of the vessel, and were not dictated by the home office of the owners; and thus they were not and could not be within the owner's "neglect" or "actual fault or privity."

SUMMARY OF ARGUMENT

Reasons Why the Case Should Not be Reviewed by This Court

1.

The holding in the present case correctly applied principles of the leading case of this Court, *Earle & Stoddard v. Ellerman's Wilson Line*, 287 U.S. 420 (1932) (per Justice Brandeis), which has been the authority, unvaryingly followed on all pertinent points, until the Ninth Circuit's aberration in *Sunkist Growers, Inc., v. Adelaide Shipping Lines*, 603 F.2d 1327 (1979), *cert. den.*, 444 U.S. 1012. *Earle & Stoddard* categorically answered petitioner's whole contention. Petitioner failed in its absolutely fundamental burden to prove that the fire was caused by the "design or neglect" or "actual fault or privity" of the

respondent, as mandated by the statutes by decision of this Court, and by the unanimous holding of all lower courts which have considered the question.

ii.

The Fifth Circuit correctly held that the blocking of the manhole to No. 3 lower tween deck by bags of flour was not the cause of ignition in the cotton stow in No. 3 lower hold; and this decisive point ought not to be disturbed.

iii.

The Ninth Circuit's *Sunkist*, is, on its facts inapposite, in that the owner/carrier there was clearly guilty of "neglect" and of "actual fault or privity"; and as to its wide-ranging *obiter dictum*, is contrary to the statutes and to the decisions of this Court. In the context of the present case it need not be considered at all as creating any actual conflict between the circuits.

iv.

As to the alleged conflict between the Second and Fifth Circuits, the exact opposite is true, the decision in the present case is in accord, in every pertinent particular, with Second Circuit's *Eurypylus*, 677 F.2d 225 (1982).

v.

As to the attack by cargo petitioner on the fire fighting efforts at the end of the voyage, both the trial court and the Fifth Circuit found as fact that those efforts to extinguish were made, on the scene, under the orders of the master of the ship, and were not attributable to the

respondent. These concurrent findings of fact are within the "two-court" rule.

I

ARGUMENT

The Congressional intent to insulate shipowners from liability for fire "unless caused by the design or neglect", or "unless caused by the actual fault or privity" of the owner, could not be stated in plainer language; and the burden of proving that precondition of liability is, by the same explicitly plain language, placed squarely on the cargo seeking to recover.

The vital burden has been an essential part of the interpretation placed upon the statutes by every court which has ever considered them. As a representative sampling see *Walker v. Transportation Co.*, 3 Wall (70 U.S.) 150 (1865), (negligence of officers and crew); *Earle & Stoddart, Inc., et al. v. Ellerman's Wilson Line, Ltd.*, 287 U.S. 420 (1932), (gross negligence of chief engineer in putting new bunker coal on top of old, which was known to be heating and thus creating a pre-voyage unseaworthy condition, discoverable by due diligence); *Consumers Import Co. v. Kabushiki Kaisha Kawasaki, et al.*, 320 U.S. 249 (1943), (negligent stowage of fish meal, making ship unseaworthy); *The Older*, 65 F.2d 359 (2nd Cir., 1933), (negligent repairs); *Hoskyn & Co., Inc. v. Silverline, Ltd.*, 143 F.2d 462 (2nd Cir. 1944), (cause of fire not proved); *The Ocean Liberty*, 199 F.2d 134 (4th Cir., 1952), *cert. den.*, 345 U.S. 992, (alleged negligent stowage); *Automobile Insurance Co., et al. v. United Fruit Company*, 224 F.2d 72 (2nd Cir., 1955), *cert. den.*, 350 U.S. 884, (alleged negligent stowage); *Fidelity-Phenix Fire Ins. Co., et als. v. Flota Mercante del Estado*,

205 F.2d 886 (5th Cir., 1953), *cert. den.*, 346 U.S. 915; *Alfa Romeo, Inc. v. S/S Torinita*, 499 F.Supp. 1272 (SDNY, 1980), (alleged negligent stowage and fire fighting), where the court also observed, at 1282: "Of particular significance is the fact that the purpose of the Fire Statute exemption is to sever the insurance aspect of a contract of carriage from the transport aspect. In this case, it is appropriate that the cargo underwriters be obligated to cover the risk that they contracted to undertake"; and *Container Schiffs, et als. v. Corporation of Lloyd's, et als.*, 1981 AMC 60 (SDNY, 1981, not otherwise reported), (alleged unseaworthiness and negligent fire fighting).

In every one of these decisions, though there was pre-voyage negligence or pre-voyage unseaworthiness, the shipowner was statutorily exonerated.

The principal thesis of petitioner in efforts to deny respondent the protection of the exemptive statutes is the mistaken notion that the right to that protection is somehow conditioned upon or connected with the shipowner's non-delegable duties in other contexts. This is an old, timeworn argument of cargo, advanced early in its efforts to thwart the explicit exemption given the carrier by law.

It had long since been exploded.

For instance, the Harter Act, 46 U.S.C. 190, *et seq.*, (1893), imposed on the shipowner the duty to "exercise due diligence to make the vessel in all respects seaworthy", in order to qualify for exemption from liability for certain kinds of cargo damage. The Harter Act, like COGSA, also provided, Sec. 195, that this "shall not be held to modify or repeal sections 4281, 4282, and 4283 of the Revised Statutes...", Section 4282 being the Fire Statute.

Notwithstanding the saving provision of Sec. 195, cargo underwriters, as here, were quick to contend that the due diligence predicate of certain of the Harter Act exemptions applied equally to the Fire Statute exemption. In *Earle & Stoddart, Inc. v. Ellerman's Wilson Line, Ltd.*, *supra*, the cargo put forward the forerunner of the precise argument made by cargo here. It was squarely rejected by this Court. The Court made clear that the exemption was *not* predicated upon the Harter Act's requirement to "exercise" due diligence to make the said vessel in all respects seaworthy...", and also made clear that the carrier is exonerated for fire even in a case of "unseaworthiness existing at the commencement of the voyage and discoverable by the exercise of ordinary care."

The court said at p. 425:

"The Courts have been careful not to thwart the fire statute by interpreting as 'neglect' of the owners the breach of what in other connections is held to be a non-delegable duty."

It is probably not without significance that *Earle* does not appear in petitioner's brief.

The foregoing mandate was again Congressionally stated when the Carriage of Goods by Sea Act of 1936 replaced the Harter Act in ocean-going commerce, 46 U.S.C. Sec. 1300, *et seq.*, and granted exemption (Sec. 1304(2)(b) from liability for "fire, unless caused by the actual fault or privity of the carrier." Even more so, the Fire Statute once again was left untouched, see Sec. 1308.

Again, perhaps not without significance, this section is not mentioned in petitioner's brief.

This arrangement is a plain quid pro quo, as stated by this Court in *Consumers Import Co., v. K.K.K. Zosenjo*, 329 U.S. 249, at 255 (1943), where the petitioner's present arguments were again rejected:

While it does not often come to the surface of the record in admiralty proceedings, we are not unaware that in commercial practice the shipper who buys carriage from the shipowner, buys fire protection from an insurance company, thus obtaining in two contracts what once might have been embodied in one. The purpose of the statute to relieve carriage rates of the insurance burden would be largely defeated if we were to adopt an interpretation which would enable cargo claimants and their subrogees to shift to the ship the risk of which Congress relieved the owner. This would restore the insurance burden at least in large part to the cost of carriage and hamper the competitive opportunity it was purposed to foster by putting our law on an equal basis with that of England.

This purpose remains as valid today as it was when the fire exemption was granted by Congress in the Fire Statute and reiterated by Congress in the Carriage of Goods by Sea Act, and efforts by subrogated cargo underwriters, as here, to vitiate the Congressional purpose ought not to be permitted to succeed.

The burden of proving "design or neglect" and "actual fault or privity" remains on petitioner, and has not been carried here.

The attack of petitioner has no legal basis whatsoever except such as may be found in *Sunkist, supra*. In it, cargo here seeks to find a conflict between the Ninth and

Fifth Circuits. An examination of the facts of *Sunkist* will quickly show that there were very serious defects in the ship herself, which were actually known to the owner's high managerial representatives, and that that series of deficiencies was sufficient to fix "neglect" or "actual fault or privity" on the owner. Those facts were decisive of the case and the court need have gone no farther. Instead, in what can fairly be called *obiter dictum*, the Ninth Circuit embarked upon a completely unnecessary repudiation of all the existing law. Again, with respect, that extensive digression makes the case an aberration which, on those points, has been sharply criticized, not only in the instant case, but in the Second Circuit's *Eurypylus*, 677 F.2d 225 (2nd Cir. 1982); and *Lloyds Marine & Commercial Law Quarterly*, p. 1, Feb., 1982.

The actual facts in *Sunkist* would have made the carrier liable, without the necessity of the court's excursion into an effort to rewrite the law. The claimed conflict of the circuits actually thus can be seen to be more apparent than real.

Another interesting feature of *Sunkist* is that it relies quite heavily on British cases decided under Canadian law (603 F.2d at 1337). The Ninth Circuit's opinion does not mention the fact that Canada has no fire statute (Tetley, *Marine Cargo Claims*, 2d Ed., p. 189; Healy and Sharpe, *Admiralty*, 1974, p. 538, footnote 75); nor does petitioner's brief.

For all of these reasons it is suggested that *Sunkist* does not warrant review of the present case as creating a conflict between circuits.

The alleged conflict between the Second and Fifth Circuits on the weight to be given to what petitioner chooses to call "circumstantial evidence" but which is

"sketchy circumstantial evidence" or "pure speculation" is not accurately stated and on examination will be found not to exist.

Both courts below agreed that the master, although listening to advice from Spanish port officials, the Spanish naval fire fighting school officials, and shore-based Lykes employees, retained and exercised actual, ultimate control over the fire fighting efforts on his ship. The tactical decisions of the master were not attributable to the owner. In this connection it seems sufficient to refer to what is popularly called the "two court rule", reflected in this court's repeated pronouncement that it cannot undertake to review concurrent findings of fact by two courts below in the absence of very obvious and exceptional showing of error, *Berenyi v. Immigration Service*, 385 U.S. 630 (1967). None of that exists here.

CONCLUSION

Accordingly it is submitted that the writ should be denied.

Respectfully,

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NOV 17 1984

No. 84-608

IN THE

Supreme Court of the United States**OCTOBER TERM, 1984****WESTINGHOUSE ELECTRIC CORPORATION, *et al.*,***Petitioners,**—against—***S/S LESLIE LYKES, her engines, etc., *in rem*, and
LYKES BROS. STEAMSHIP CO., INC.,***Respondents.***ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT****REPLY BRIEF****JAMES H. SIMONSEN**
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Other Authority:

Gilmore and Black, *The Law of Admiralty*, (2d ed. 1975):

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REPLY BRIEF

The petition sets forth four rulings of law by the Fifth Circuit herein which are believed to be in conflict with rulings by other Circuits.

The brief in opposition, although posing different questions for review and thus perhaps inferentially disagreeing with the alleged materiality or substance of the questions set out in the petition, seemingly specifically attacks as being inappropriate for review by this Court only three of the four areas of conflict, which are proposed in the petition.

We shall discuss pertinent arguments raised in the Brief in Opposition in the order in which the questions suggested for review appeared in the petition.

The Owner's Responsibility for Proper Loading. (Petition, pp. 7-10)

Under this heading we discussed the question whether the Fifth Circuit's ruling in this case, that design or neglect with respect to negligent stowage requires proof that management had actual knowledge that the access manhole would be blocked by cargo on the voyage of the fire, was correct rather than the Second Circuit's conflicting view that there is design or neglect if management should have known that the manhole would be blocked, as the District Court found, as that was the carrier's longstanding practice.

We cited *Great Atlantic & Pacific Tea Co. v. Lloyd Brasileiro*, 159 F. 2d 661, 665 (2d Cir.) *cert. denied, sub nom., Lloyd Brasileiro v. Great Atlantic & Pacific Tea Co.*, 331 U.S. 386 (1947), and *Verbeeck v. Black Diamond Steamship Corp.*, 269 F. 2d 68, 71 (2d Cir. 1959), *cert. denied, sub nom. Skibs A/S Jolund v. American Smelting & Refining Co.*, 361 U.S. 934 (1960) in support of the position that there is a conflict on this issue.

No specific reference is made to these decisions in the brief in opposition, and the point that there is a conflict must be taken as conceded unless the assertion appearing on its page 6 that the "alleged conflict between the Second and Fifth Circuits" is nonexistent as the present case is in accord with the Second Circuit's *In the Matter of the Complaint of TA CHI NAVIGATION (PANAMA) CORP., S.A., as Owner of the S.S. EURYPYLUS, etc.*, 677 F. 2d 225 (2d Cir. 1982), was intended to be in rebuttal. In fact, EURYPYLUS did not deal with the issue under consideration. No finding had been made as to whether there was design or neglect. The case was sent back for a determination of that issue as the Second Circuit ruled that the lower Court's reliance on *Sunkist Growers, Inc. v. Adelaide Shipping Lines Ltd.*, 603 F. 2d 1327 (9th Cir. 1979) was misplaced.

It should be noted that the Fifth Circuit did not disturb the finding of the lower Court herein that the negligent blocking of the access manhole was a proximate cause of the cutting of the access hole in the bulkhead which contributed to the flooding damage in #4 hold. (734 F. 2d at pp. 214-215.) Hence, a resolution by this Court of the conflict between Second and Fifth Circuits in favor of the Second's view that there is design or neglect if management should have known that the cargo would be improperly stowed to block access in accordance with customary company procedure would resolve this case without the extended analysis of the findings of fact respondent appears to contend would be necessary. (Brief in Opposition, p. i.)

The Extinguishment of the Fire. (Petition, pp. 10-12.)

Petitioners second question for review concerned the conflict between the Fifth Circuit's ruling in this case and prior rulings of the Second and Ninth Circuits on management's responsibility for fighting fire aboard a vessel in port.

Respondent maintains that the question is not open for re-

view by virtue of this Court's rule that concurrent findings of fact by two Courts below will not be reviewed in the absence of very obvious and exceptional showing of error. (Brief in Opposition, p. 12.)

The position is untenable. This is not a question of fact, but of law. The District and the Circuit courts in any event applied two different standards.

The District Court found that neither suggestions made by Home Office Management nor the active assistance of the port engineer aboard the vessel constituted "control such as to contribute the fire fighting endeavors to Lykes' management". (See Note 10, 734 F. 2d, p. 215.)

The affirmance by the Fifth Circuit was on another ground. It held that "[t]he owner is not liable for a master's negligence in fighting fires, unless the supervision exercised by the owner is also negligent". (734 F. 2d, at p. 216.)

The Circuit interpreted the District Court's finding that the master's actions were not attributable to the owner as stating "in different words that management level employees did not know of any obviously unwise course of action taken by the Master that would require the owner to rigidly overrule the Master's 'good faith latitude in professional judgment' by relieving him of his command." (734 F. 2d, at p. 215.) With respect to the ruling that there was no design or neglect in the steps taken to extinguish the fire, as the District Court relied on a finding of absence of control by management and the Circuit Court relied on its determination that supervision by management was not improper and that management was unaware that the plan was "obviously unwise", there were no concurrent findings of fact which might invoke the so-called "two court rule".

We think the decisions in *Great Atlantic & Pacific Tea Co.*, *supra*, and *American Mail Line Ltd., v. Tokyo Marine & Fire*

Insurance Company, 270 F. 2d 499 (9th Cir. 1959), holding that management has the duty to deal with fire aboard a vessel in port, are a complete answer to respondent's position that the owner can only be held liable if it dictated the fire fighting plan. (Brief in Opposition, p. 5.)

We think that respondent's position in that regard in any event is more favorable to cargo than is the Fifth Circuit's ruling in this case that there can be no liability so long as management level employees do not know that the course of action being taken is "obviously unwise". This ruling would seem to preclude liability even if management designed and prescribed use of the plan. Respondent's position thus could be taken as an indication that the Fifth Circuit's ruling on the law is wrong to that limited extent.

But the effect is greater than this. It is unrealistic to differentiate between orders and suggestions to the Master by the Home Office when the vessel is in port. The Master is always free to disagree, but the Home Office is always free to relieve him. In this case, the Master telephoned the Home Office every day. He did so either because he was instructed to do so, or because he felt he needed its approval and assistance. Since the plan of action had Home Office approval, if it were negligent, it was equally the negligence of the Master and the Home Office.

Whether, and, if so, under what circumstances, management must take control is a question of law. The same issue arises in cases involving limitation of liability. Gilmore and Black, *The Law of Admiralty* (2d ed. 1975), pp. 877-895. In the opinion of Judge Friendly of the Second Circuit expressed in the *Petition of Kinsman Transit Company (The SHIRAS)*, 338 F. 2d 708, at p. 715, and in the opinion of Professors Gilmore and Black expressed in *The Law of Admiralty, supra*, at pp. 890, 894, this question is in urgent need of decision by this Court.

Burden of Proof. (Petition, p. 13.)

Respondent asserts that the decisions by the Fifth Circuit herein and by the Second Circuit in *EURYPYLUS*, *supra*, are only apparently in conflict with the decision of the Ninth Circuit in *Sunkist*, *supra*, as the ruling in the latter case on burden of proof is *obiter dictum*, having been unnecessary as the facts in any event established design or neglect. (Brief in Opposition, pp. 6, 11.)

This is not so. The District Court found that the deficiencies were solely the fault of the crew, and hence not the design or neglect of the owner. (603 F. 2d, at p. 1331.) Moreover, neither the Second Circuit in *EURYPYLUS* nor the Fifth Circuit in this case deemed the *Sunkist* decision to be *obiter dictum*.

CONCLUSION

The Petition for Certiorari should be granted.

Respectfully submitted,

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November 15, 1984.